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# Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law

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## LEGAL IDEOLOGY AND INCORPORATION IV: THE NATURE OF CIVILIAN INFLUENCE ON MODERN ANGLO-AMERICAN COMMERCIAL LAW†

DANIEL R. COQUILLETTE\*

"It is further clear that the equity to which [Lord Mansfield] was referring is not 'an equity' in the sense in which it was used in the Court of Chancery. . . . [He] was referring to the *jus naturale* of Roman law which . . . has had a considerable influence in moulding our common law."\*\*

Lord Justice Farwell

This Article is the fourth in a four-part series entitled *Legal Ideology and Incorporation*. In this series, Dean Coquillette demonstrates that, although England has fostered a strong common law system, significant intellectual work was done in England during the sixteenth and seventeenth centuries by students of the civil law systems dominant on the Continent, particularly in their mercantile and diplomatic specialties. Dean Coquillette traces the development of the juristic works of these English civilians, and examines the civilians' intellectual influence on the English common law. It is his central thesis that the English civilian jurists never intended to achieve a direct "incorporation" of civil law or mercantile doctrines into the common law. Rather, their lasting achievement has been the significant influence that their ideas about law—their "legal ideology"—have exercised on leading common lawyers and on modern commercial and international law.

Dean Coquillette divides the development of English civilian jurisprudence into three periods. The first period includes the years from the publi-

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Earlier versions of this Article were presented on October 21, 1983, at a conference, *Courts and the Development of Commercial Law*, held at the Università di Genova and sponsored by the Henkel Foundation, and on October 20, 1984, at the American Society for Legal History, Annual Meeting. It is appropriate to thank here my Administrative Assistant, Mr. David W. Price, whose dedication and intelligence was invaluable in bringing this work to successful completion. I am also particularly grateful for the assistance of Professor Charles Donahue, Jr. of the Harvard Law School and Professor James S. Rogers of the Boston College Law School. All errors, of course, are my own.

\*\* Baylis v. Bishop of London, [1913] 1 Ch. 127, 137 (1912).

cation of Christopher St. German's seminal *Doctor and Student* in 1523 to the storm of protest from common lawyers following the publication of John Cowell's highly controversial *The Interpreter* in 1607. During this significant period, English civilian writing tended to promote synthesis and accommodation with the common law, and formed a pioneering venture in comparative law—a remarkable ideological effort that rewards study for its own sake. This period was discussed in the first Article in this series, *Legal Ideology and Incorporation I: The Early Civilian Writers, 1523-1607*, which appeared in the January 1981 issue of the *Boston University Law Review*.

The second period of English civilian juristic development includes the years from the publication of the civilian Sir Thomas Ridley's major work, *A View of the Ecclesiastical and Civile Law*, in 1607 to the publication of the common lawyer Charles Molloy's great *Treatise of Affairs Maritime and of Commerce* in 1676. During this period, the common lawyers, initially led by Coke, mounted increasing jurisdictional and political attacks on the civilians and at the same time attempted to co-opt civilian methodology in those vital, growing fields in which the civilians had exhibited particular expertise, most notably the law merchant. In response, the civilians became defensive in their juristic attitudes. Instead of continuing previous attempts to synthesize civil and common law, they began to try to isolate and maintain whatever pockets of influence they had already established. The critical struggle was both literary and intellectual, and it centered on the traditional civilian strongholds of the international law merchant and the Admiralty jurisdiction. This period was discussed in the second Article in the series, *Legal Ideology and Incorporation II: Sir Thomas Ridley, Charles Molloy, and the Literary Battle for the Law Merchant, 1607-1676*, which appeared in the March 1981 issue of the *Boston University Law Review*.

The third period of English civilian juristic development was the subject of *Ideology and Incorporation III: Reason Regulated—The "Post-Restoration" English Civilians, 1653-1735*, which appeared in the March 1987 issue of the *Boston University Law Review*. This period commences with the years during and after the Commonwealth, and extends into the eighteenth century. By then, the common lawyers were succeeding in their attacks, leaving civilian scholars, such as Godolphin, Duck, Wiseman, Zouche, Exton, Leoline Jenkins, Wood, Strahan, and Ayliffe with what could have been an increasingly narrow and specialized role in the English legal system. In this concluding Article, Dean Coquillette argues that the most important contribution of these later civilian writers to Anglo-American law lies in the nature of their influence, direct and indirect, on such leading common lawyers as Bacon, Selden, Hale, Holt, and Mansfield.

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# I. INTRODUCTION: THE NATURE OF CIVILIAN INFLUENCE ON MODERN ANGLO-AMERICAN COMMERCIAL LAW

The juristic writings of the Interregnum and post-Restoration civilians provide a fascinating picture. These civilians clashed with common lawyers as they attempted to establish an ideological foothold in the developing English mercantile law during the Interregnum.<sup>1</sup> The Restoration saw them on the defensive as they struggled to protect the jurisdiction of the Admiralty.<sup>2</sup> Finally, as hope faded, the civilians retreated to the sanctuary of academia to regroup and redefine their goals.<sup>3</sup>

We are left with serious questions. Was the greatest civilian promise, as Ayliffe has asserted, in the reign of Elizabeth after the first Admiralty settlement of 1575?<sup>4</sup> Did the civilians achieve any substantial incorporation of civilian doctrine during their control of the Admiralty? And what caused their later political defeats? These occurred during a period, the Restoration, which should have been at least a neutral political environment.<sup>5</sup> Finally, what influence did the civilians actually have on the law merchant?

J.H. Baker asked this fundamental question: "Why did it emerge as a 'peculiar and novel principle' [at common law] in the seventeenth century that a 'custom prevailing between merchants could originate a legal duty'?"<sup>6</sup>

<sup>1</sup> See Coquillette, *Ideology and Incorporation III: Reason Regulated—The Post-Restoration English Civilians, 1653-1735*, 67 B.U.L. REV. 289, 300-23 (1987).

<sup>2</sup> See *id.* at 323-42.

<sup>3</sup> See *id.* at 342-60.

<sup>4</sup> J. AYLIFFE, *THE NEW PANDECT OF THE CIVIL LAW* ii (London 1734).

<sup>5</sup> Coquillette, *supra* note 1, at 324.

<sup>6</sup> Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295, 298 (1979).

After conclusively demonstrating that this notion was not derived from some preexisting common law theory, Baker examined whether the law merchant had ever existed as a source of law and, if so, whether it was treated by the common law courts as law, custom, or usage.<sup>7</sup> Baker concluded that the common law had never adopted the expedited procedures of the *lex mercatoria*.<sup>8</sup> Nor did the substantive mercantile law exist as a coherent system before the common law began to give it expression.<sup>9</sup> Even this process had not developed much by 1700 because mercantile usage "was still treated as a matter of fact within the province of juries rather than judges."<sup>10</sup> If there was a law merchant before the early eighteenth century and Mansfield, it was not imported from the *ius gentium*.<sup>11</sup> Nor was it the law of the specialist mercantile courts.<sup>12</sup> It was, in fact, "nothing more than a refinement of the common law that always governed mercantile affairs."<sup>13</sup> This process of refinement, asserted Baker, cannot be characterized as "doctrinal incorporation," that is, the grafting of ready-made law from other jurisdictions.<sup>14</sup> Rather, it was "a crystallization of principles which had previously been left to the general knowledge and common sense of city juries."<sup>15</sup> The common law courts, he concluded, "did not operate those procedures by 'incorporating' a law merchant, in any of the usually accepted senses of that term. They used them to create it."<sup>16</sup>

It is striking that Baker simply did not mention the civilian specialists or the Admiralty. The implication is that, incredibly, they were not a source of emerging legal doctrines for governing modern commercial transactions. But I have a thesis that may appear even more odd, at least for someone who has spent years studying English civilians. It is that Baker is absolutely right. The direct civilian contribution was surprisingly small. Further, I believe that this thesis will help explain why the civilians behaved as they did during the Interregnum and Restoration, and why, despite their great juristic talents, they lost their key struggles for jurisdiction.

This thesis, if true, raises fundamental questions about the nature of civilian influence. First, if the common law *lex mercatoria* was developed entirely by common lawyers from mercantile custom, did the civilians also adapt inchoate mercantile custom in the Admiralty, or at least custom that was "touched up" for their purposes by reference to civil law? Second, were civilian legal ideas isolated in the specialty jurisdictions? Was there no direct

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<sup>7</sup> *Id.* at 299.

<sup>8</sup> *Id.* at 321.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 321-22.

<sup>14</sup> *Id.* at 322.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

"importation from the *ius gentium*" into the common law before Mansfield, either by way of the civilians or any other way? Finally, let us assume that there was no "incorporation" of a law merchant "in any of the usually accepted senses of that term" and no "borrowing of ready-made law from other jurisdictions."<sup>17</sup> Did civilian doctrines simply disappear when civilian jurisdictions were first crippled, and then effectively eliminated?<sup>18</sup>

This last hypothesis, if true, would certainly explain the fervor of the jurisdictional battles of the Interregnum and Restoration, as well as the emphasis by the civilians on juristic writing.<sup>19</sup> If civilian jurisdictions were shrinking, and if the common law courts were proving impregnable in practice to civilian doctrines and procedures, then ideological advocacy and political action were all that was left to them. If they could not succeed in the competitive marketplace for legal services or prevail through the established legal process, political change was their only hope.

Baker's common law research appears to be very convincing.<sup>20</sup> But, again, he ignores the civilian presence. How can his conclusions be tested in light of what we know about civilian writing, civilian law practice, and "special" civilian doctrines? To test his conclusions, I decided to focus directly on the early development of a famous "special" doctrine of the law merchant, the bill of exchange. I will then examine the later "modern" commercial law cases of Holt and Mansfield.

There will be two digressions from commercial law, which are nevertheless essential to my conclusion. These concern: 1) civilian influence on Bacon, Hobbes, Selden, and Hale; and 2) certain of Mansfield's opinions that do not concern commercial law, but are eloquent as to Mansfield's judicial philosophy. The reason for these digressions lies in my ultimate conclusion, that, as Baker's work implies, there was no direct incorporation of specific civilian doctrines in the commercial law area, but that Holt's and Mansfield's approach to commercial law problems was influenced by civilian methodology and jurisprudence. In particular, Holt and Mansfield searched for an articulable body of principle independent from the strictures of common law forms of action. This methodology was adumbrated by Holt, but failed to obtain full fruition until Mansfield.

## II. BILLS OF EXCHANGE: A MERCANTILE SPECIALTY

Bills of exchange were originally a method of transporting value without

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<sup>17</sup> *Id.*

<sup>18</sup> Coquillette, *supra* note 1, at 342-61.

<sup>19</sup> *Id.* at 300-42.

<sup>20</sup> In fact, Baker's article, *supra* note 6, is the most original discussion of the topic since Sutherland's brilliant piece appeared in 1934. See Sutherland, *The Law Merchant in England in the Seventeenth and Eighteenth Centuries*, in 17 *TRANSACTIONS ROYAL HIST. SOC'Y* 149 (1934).

carrying bullion and for facilitating mercantile credit.<sup>21</sup> They were probably first used in Italy in the twelfth century.<sup>22</sup> English merchants were using

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<sup>21</sup> For the best extant account of the history of bills of exchange in England, see J. HOLDEN, *THE HISTORY OF NEGOTIABLE INSTRUMENTS IN ENGLISH LAW* 4-65 (1955). See also 8 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 151-70 (2d ed. 1937); W. MITCHELL, *AN ESSAY ON THE EARLY HISTORY OF THE LAW MERCHANT* 34-35 (1904); F. SANBORN, *ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW* 215-24 (1930); T.A. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* 323-418 (1906); Beutel, *The Development of Negotiable Instruments in Early English Law*, 51 HARV. L. REV. 813 (1938); Fifoot, *The Development of the Law of Negotiable Instruments*, 1938 J. INST. BANKERS 433; Jenks, *The Early History of Negotiable Instruments*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 51-71 (1909) [hereinafter 3 SELECT ESSAYS]. For an account of the earliest English writers on bills of exchange, see *infra* note 30.

For two great "classical" accounts, see Cranch, *Promissory Notes Before and After Lord Holt*, in 1 U.S. (1 Cranch) 367 app. (1804), reprinted in 3 SELECT ESSAYS, *supra*, at 72-97 (with some omissions); J. STORY, *COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE* 1-25 (Boston 1843).

These works built in turn on the leading eighteenth-century treatises, such as J. BAYLEY, *A SHORT TREATISE ON THE LAW OF BILLS OF EXCHANGE* (1st ed. Dublin 1789); J. BYLES, *A TREATISE ON THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, BANK NOTES AND CHEQUES* (1st ed. London 1829); J. CHITTY, *A TREATISE ON THE LAWS OF BILLS OF EXCHANGE* (1st ed. London 1799); T. CUNNINGHAM, *THE LAW OF BILLS OF EXCHANGE, PROMISSORY NOTES, BANK-NOTES, AND INSURANCE* (1st ed. London 1760); S. KYD, *THE LAW OF BILLS OF EXCHANGE AND PROMISSORY NOTES* (1st ed. London 1790); P. LOVELASS, *A FULL, CLEAR AND FAMILIAR EXPLANATION OF THE LAW CONCERNING BILLS OF EXCHANGE . . .* (1st ed. London 1789); and the extensive descriptions in the eighteenth-century law dictionaries and abridgements, see, e.g., 3 M. BACON, *A NEW ABRIDGEMENT OF THE LAW* 602-14 (3d ed. London 1768); 1 R. CUNNINGHAM, *A NEW AND COMPLETE LAW-DICTIONARY* (unpaginated; entry under "Bill of Exchange") (London 1771); G. JACOB, *A NEW LAW DICTIONARY* (unpaginated; entry under "Bill of Exchange") (London 1732). For an account of the earliest English writers on bills of exchange, see BAKER, *supra* note 6, at 356-360; see also *infra* notes 30-33 and accompanying text. I am very indebted to my colleague James S. Rogers for his assistance in compiling this list.

For other interesting treatises of the day, see T. BOND, *DIGEST OF FOREIGN EXCHANGES: CONTAINING AN ABSTRACT OF EXISTING LAWS* (Dublin 1795); G. CROKE, *THE MERCHANT, TRADESMAN, AND FARMER'S DIRECTOR: CONTAINING THE RULES . . . FOR DRAWING, ENDORSING, ACCEPTING, NOTING, AND PROTESTING FOREIGN AND INLAND BILLS OF EXCHANGE . . . WITH . . . CASES, DETERMINED BY LORD MANSFIELD, AND OTHERS* (London 1778); S. GODFREY, *THE GREAT QUESTION OF BILLS OF EXCHANGE, CALLED FICTITIOUS, CONSIDERED IN A LETTER . . .* (London 1790). For an interesting treatise by a Scottish advocate, see W. FORBES, *A METHODICAL TREATISE CONCERNING BILLS OF EXCHANGE* (Edinburgh 1703).

<sup>22</sup> See F. SANBORN, *supra* note 21, at 220-21; Jenks, *supra* note 21, at 51; Thayer, *infra* note 27, at 148. Sanborn located a simple one (drawer only) dated 1156 in

them by the middle of the fourteenth century,<sup>23</sup> just about the time the Admiralty court was established.<sup>24</sup> By the middle of the sixteenth century, they had become common in England.<sup>25</sup> Bills of exchange were eventually

Genoa, and a standard short form bill dated 1207. The statute, *None Shall Take Any Benefice of an Alien or Convey Money to Him*, 3 Rich. II, ch. 3 (1380), mentions bills of exchange as a way of conveying money out of the Kingdom, but also states that they were not in use in England. F. SANBORN, *supra* 21, at 220-21.

<sup>23</sup> See A. HARDING, *A SOCIAL HISTORY OF ENGLISH LAW* 319 (1973); A. KIRALFY, *A SOURCE BOOK OF ENGLISH LAW* 244-45 (1957); Baker, *supra* note 6, at 304. See the example of 1300 contained in the London Mayor's Court Rolls. *CALENDAR OF EARLY MAYOR'S COURT ROLLS 1298-1307*, at 94 (A. Thomas ed. 1924) (entry of July 11, 1300). I am very indebted to my colleague, James S. Rogers, for this citation, and for insights into what follows.

<sup>24</sup> See J. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 106-09 (2d ed. 1979).

<sup>25</sup> *Id.* at 310. Although the bills were eventually used for many purposes, see *infra* note 26, a simple example of an early bill arrangement is useful.

Suppose merchant A wished to get a sum of money from Bruges to London without transporting bullion. A would arrange with B, a Bruges banker or merchant with a partner in London, C, to direct C to give A or A's agent the specified sum in English currency. A, the remitter, would give the sum to B, the drawer, who would charge a commission. B would then provide A a letter without a seal directing C, the drawee, to give the money to A or to A's agent, or to another payee, or "to bearer," or later, to A's order. That letter was the "bill of exchange." See 1 W. STRAHAN, *THE CIVIL LAW IN THE NATURAL ORDER TOGETHER WITH THE PUBLIC LAW . . . WRITTEN IN FRENCH BY MONSIEUR DOMAT . . . AND TRANSLATED INTO ENGLISH BY WILLIAM STRAHAN LL.D. . . . WITH ADDITIONAL REMARKS ON SOME MATERIAL DIFFERENCE BETWEEN THE CIVIL LAW AND THE LAW OF ENGLAND* 231 (2d ed. London 1737).

This is obviously a simplified picture, but it is important to focus on two facts. First, there was no legal relationship between C, the London partner, and merchant A unless C "accepted" the letter, usually by writing on it. If C did not provide the money as agreed, A could bring an action only against B, the drawer. C was not under a duty to pay A, and the key question was what kind of duty C had to B. Second, these bills were eventually often made to "A, on his order." In this form, A could assign the note to another party, D, by writing something as simple as "pay to D" on the back of the letter and signing it. What rights did an endorsee, like D, have against the acceptor, against the drawer, or against the endorser?

For an excellent reproduction of a typical bill by Hubert Hall, see 3 *SELECT CASES CONCERNING THE LAW MERCHANT* 117 (Selden Soc'y Pub. No. 49, 1932). The bill dated from 1436 and was made at

Bruges in the parts of Flanders, by John Audeley, factor and attorney of Elias Davy, merchant, written, made and directed to the same Elias, his master, to pay the same thirty pounds to a certain John Burton, merchant, or to the bearer of the letter aforesaid, in these words: "To my very honoured master Elias Davy, mercer, at London, let this be given: Very honoured sir, please it you to know that I have received here of John Burton, by exchange, £30. payable at London to the aforesaid John or to the bearer of this letter of payment on the 14th day of March next coming, by this my first and second letter of payment. And I pray



used for things that had nothing to do with their original purposes, perhaps even before they were being routinely enforced. They were used as de facto promissory notes, documents of insurance, vehicles for speculation and limited risk sharing, negotiable instruments, vehicles for discounting, a kind of primitive traveler's check, and even as a means of gambling.<sup>26</sup> In England,

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you that it may be well paid at the day. Written at Bruges, the 10th day of December, by your attorney John Audeley, etc."

The bill was featured in a case brought by the payee, John Burton, and the bearer, John Walden, against the drawee, Elias Davy. On proof that Audeley had received Burton's money "by exchange," Elias was ordered to pay the bearer "according to the law merchant and custom of the city of London, in such cases used and approved from a time of which no memory survives." *Id.* at 117-18. This came from an order by the Chancery to the London "court merchant" to produce the record, doubtless so that Elias could appeal liability as a drawee. *Id.* at 117. It had already been brought up before "his [King's] justices at Westminster" and remitted back to the London court. *Id.* at 118-19.

The depiction of early bill of exchange transactions here presented represents the consensus of the standard works on the legal history of bills of exchange. Indeed, it had become the conventional story as early as the time of the first real English legal treatises on bills of exchange. See, e.g., S. KYD, *A TREATISE ON THE LAW OF BILLS OF EXCHANGE AND PROMISSORY NOTES* 1-3 (London 1790). My colleague, James S. Rogers, however, is engaged in research on the history of negotiable instruments law and practice, and he has advised me that his tentative conclusion is that the traditional picture—especially the assumption that early bill transactions were solely a matter of funds transmission through bankers or other financial professionals—may be rather misleading. See, for example, the picture of early bills of exchange in Powers, *The Wool Trade in the Fifteenth Century*, in *STUDIES IN ENGLISH TRADE IN THE FIFTEENTH CENTURY* 68-70 (E. Power & M. Postan eds. 1932).

<sup>26</sup> As Sutherland has pointed out, bills of exchange and policies of insurance were "instruments of a strong legal similarity." Sutherland, *supra* note 20, at 176. Malynes demonstrated how bills of exchange were actually used like insurance. See generally G. MALYNES, *CONSUETODO, VEL, LEX MERCATORIA* 260-74 (2d ed. London 1685) (London 1622), discussed in J. HOLDEN, *supra* note 21, at 4-65; see also *infra* note 110. The voyage could be financed in part by one who accepted a bill of exchange in return. The bill, payable within a certain number of days from the safe arrival of the ship, would be carried on the ship itself. The speculator would calculate the risk into the exchange rate. If the ship were lost, the note would not be payable. Thus an owner could hedge risk on a voyage by part financing through such bills. See generally W. BEAWES, *LEX MERCATORIA REDIVIVA* 448-92 (4th ed. London 1783); 8 W. HOLDSWORTH, *supra* note 21, at 273-93; 2 C. MOLLOY, *DE JURE MARITIMO ET NAVALI* 86-118 (10th ed. London 1778); Vance, *The Early History of Insurance Law*, in 3 *SELECT ESSAYS*, *supra* note 21, at 98-116.

Eventually, the form of the bill of exchange was adapted for at least fourteen purposes, some closely related, and I am certain there were more: 1) transfer of funds without risk of transporting bullion; 2) changing currency; 3) a crypto-promissory note; 4) loans outside the usury laws; 5) insurance contracts; 6) commercial speculation; 7) risk sharing; 8) pure gambling, see C. MOLLOY, *supra* note 26, at 113; An Act

their most important use was as an instrument of credit. This had a definite effect on their English development.<sup>27</sup>

English bills of exchange were enforceable against the drawer at both common law and in the Admiralty. By the middle of the 1500s, they were enforced in the King's Bench by "general assumpsit." The Admiralty's concurrent jurisdiction over bills of exchange was assured by the Settlement of 1575, along with bills of lading, insurance, and bottomry.<sup>28</sup> One fair question would be whether these bills were treated differently by the civilian jurisdiction than by the common law courts and, if so, could the differences be attributed to civil law doctrines or procedures?<sup>29</sup>

for the Better Preventing of Excessive and Deceptful Gaming, 9 Ann., ch. 14 (1709); 9) negotiability; 10) for money advanced on a letter of credit, *see* C. MOLLOY, *supra* note 26, at 114; 11) discounting by purchase before a due date, *see* A. HARDING, *supra* note 23, at 319 (1973); 12) as an absolute substitute for currency in places such as Scotland and America, *see id.* at 320; 13) primitive traveler's checks, *see* T. HILL, HILL'S MANUAL OF SOCIAL AND BUSINESS FORMS 96 (Chicago 1886); and 14) as bank checks, *see* T. PARSONS, THE LAWS OF BUSINESS FOR BUSINESS MEN 94 (Boston 1866) (observing that "[a] check on a bank is undoubtedly a bill of exchange").

<sup>27</sup> *See infra* notes 35-40 and accompanying text; *see also* M.D. CHALMERS, DIGEST OF THE LAW OF BILLS OF EXCHANGE xlix (10th ed. 1932); Thayer, *Comparative Law and the Law Merchant*, 6 BROOKLYN L. REV. 139, 149-50 (1936). As Thayer observed:

The importance of the bill of exchange in medieval commerce lay in the essential fact that by its use the necessity for a physical transfer of money from place to place could be avoided. The entire theory of French law in regard to bills of exchange from the ordinance of 1673 until 1935, had been grounded in this basic mercantile view of the transaction. In England, where the absorption of the law merchant into the common law was taking place during the same century that witnessed the evolution of commercial banking, the chief function of the bill of exchange was conceived to be as an instrument of credit rather than as the documentary representative of an actual exchange transaction.

*Id.*

<sup>28</sup> There is some question whether the Settlement of 1575 was, in fact, actually signed, or even concluded. Coke denied it. E. COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 136 (6th ed. London 1681). It may not have been signed by the Judges. *See* 2 SELECT PLEAS IN THE COURT OF THE ADMIRALTY xiv (Selden Soc'y Pub. No. 11, R. Marsden ed. 1897) [hereinafter 2 SELECT PLEAS]. Copies of the agreement dated May 12, 1575 do exist. There is one curious fact: the Act Book for 1574, where the agreement was supposed to have been entered, disappeared. *Id.* at xiv. *See also* 1 W. HOLDSWORTH, *supra* note 21, at 313-32 (1st ed. 1903).

<sup>29</sup> Even the application of civil law did not automatically mean that the bills would be treated differently from the common law. Matthew Hale, among others, argued that civil law was applied at common law in maritime and other appropriate cases, as by the law of England it should apply. 2 SELECT PLEAS, *supra* note 28, at lxxx; G. KEETON, ENGLISH LAW, THE JUDICIAL CONTRIBUTION 185 (1974).

### A. *Problems in Practice Associated with Bills of Exchange.*

Before looking at legal doctrine it is worth examining bills of exchange from the perspective of seventeenth-century merchants who, like their counterparts today, were concerned more with practical execution than legal theory.<sup>30</sup> For example, determining who, as a matter of custom, could legitimately use bills of exchange was an important practical issue. Malynes defined bills as valid between merchants only,<sup>31</sup> and there is some evidence of an even narrower early construction, in which only merchant strangers trading with English merchants could use the bills.<sup>32</sup> Although not clearly

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<sup>30</sup> Thanks to the early English merchant writers, particularly Gerard Malynes, John Marius, Richard Dafforne, John Carpenter, and, somewhat later, Wyndham Beawes, we know quite a bit about these problems, even though there are limited legal records. *See supra* note 26; J. CARPENTER, *A MOST EXCELLENT INSTRUCTION FOR KEEPING MERCHANTS BOOKES OF ACCOUNTS* (London 1632); W. BEAWES, *LEX MERCATORIA REDIVIVA* (1st ed. London 1751) (reprinted in 1761 (2d ed.), 1771 (3d ed.) and 1783 (4th ed.)) R. DAFFORNE, *LATE ACCOMPTANT, THE MERCHANTS MIRRORS* (London 1684); L. ROBERTS, *THE MERCHANTS MAPPE OF COMMERCE* (London 1638). The Dafforne and Carpenter books have recently been reproduced in facsimile, by Professional Books Ltd. (Abingdon 1981) and Walter J. Johnson (Amsterdam 1975), respectively.

Wyndham Beawes' great *LEX MERCATORIA REDIVIVA* (1st ed. London 1751) (hereafter *REDIVIVA*), was reprinted in 1761 (2d ed.), 1771 (3d ed.), and 1783 (4th ed.). The latter edition has also been republished in facsimile by Gregg International Publishers Ltd. (Farnborough 1970). There were five later editions of *REDIVIVA*, including a sixth edition which was considerably enlarged and improved by Joseph Chitty (London 1813). *See* 12 W. HOLDSWORTH, *supra* note 21, at 384-85, 754-56. Worrall gives the first edition as 1751. *See* J. WORRALL, *BIBLIOTHECA LEGUM ANGLIAE* 229 (2d ed. 1788); *see also* Coquillette, *Legal Ideology and Incorporation II: Sir Thomas Ridley, Charles Molloy, and the Literary Battle for the Law Merchant 1607-1676*, 61 B.U.L. REV. 315, 356-63 (1981) (discussing the contributions of Malynes and Marius).

Collections of commercial records in London and elsewhere have only been examined with any care in relatively recent times, and they could tell us even more. *See, e.g.*, *SELECT PLEAS AND MEMORANDA OF THE CITY OF LONDON, 1381-1412* (A. Thomas ed. 1932) [hereinafter *SELECT PLEAS AND MEMORANDA*]; *CALENDAR OF EARLY MAYOR'S COURT ROLLS 1298-1307* (A. Thomas ed. 1924); *CALENDAR OF PLEA AND MEMORANDA ROLLS 1323-1364* (A. Thomas ed. 1926); *CALENDAR OF PLEA AND MEMORANDA ROLLS 1364-1381* (A. Thomas ed. 1929); *CALENDAR OF SELECT PLEA AND MEMORANDA ROLLS 1381-1412* (A. Thomas ed. 1932); *CALENDAR OF PLEA AND MEMORANDA ROLLS 1413-1437* (A. Thomas ed. 1943); *CALENDAR OF PLEA AND MEMORANDA ROLLS 1413-1457* (P. Jones ed. 1954); *CALENDAR OF PLEA AND MEMORANDA ROLLS 1458-1482* (P. Jones ed. 1961); *THE LAWES OF THE MARKET* (Walter J. Johnson, Inc. rev. ed. 1974) (London 1595).

<sup>31</sup> G. MALYNES, *supra* note 26, at 378.

<sup>32</sup> *See* 8 W. HOLDSWORTH, *supra* note 21, at 169 (2d ed. 1937) (quoting Bromwich v. Lloyd, 125 Eng. Rep. 870 (1697)).

articulated by the mercantile writers, there was a notion that bills of exchange were a "specialty" in the old sense, not as a document under seal, but literally "special" because of the peculiar status of the participants which, in turn, customarily attracted "special law," as did so many transactions in medieval England."<sup>33</sup>

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<sup>33</sup> The definition of a "specialty" found in modern law dictionaries is "a contract [or document] under seal." BLACK'S LAW DICTIONARY 1571 (4th ed. 1968) [hereinafter BLACK'S]; THE DICTIONARY OF ENGLISH LAW 1683 (2d ed. 1959); see also 3 BOUVIER'S LAW DICTIONARY 3100 (8th ed. 1914) [hereinafter BOUVIER'S] (a specialty is a writing sealed and delivered) (quoting *Taylor v. Blasser*, 2 Serg. & Rawle 501, 503 (Pa. 1816)). Modern courts have expanded the definition. See *Carruthers v. Peninsula Life Ins. Co.*, 150 Fla. 467, 469, 7 So. 2d 841, 842 (1952) (A corporate seal not necessary where "formality indicates that the instrument was intended to be a specialty."), quoted in BLACK'S, *supra*, at 1571.

The word as used in English law up until the eighteenth century, however, had a broader definition. Anything which, because of its form or content, attracted "special law" was called a "specialty," 3 W. HOLDSWORTH, *supra* note 21, at 90, including some agreements not in writing. A deed was only a *kind* of a "specialty," which depended for its special status at law, not just on a seal, but on writing and delivery, as well. *Goddard's Case*, 76 Eng. Rep. 396 (London 1584). In fact, it was the exception made by the law which was originally termed "a specialty," rather than the writing itself. See, e.g., J. COWELL, THE INTERPRETER OR BOOKE CONTAINING THE SIGNIFICANCE OF WORDS (unpaginated, under "Specialty") (T. Manley ed. London 1701) (Cambridge 1607) ("A specialty is *taken* for a Bond, Bill or such like Instrument.") (emphasis added). By 1732, a "specialty" was defined as being the writing itself, but "under the Hand and Seal" was given only as an alternative meaning to "any Bond, Bill, or such like Instrument." G. JACOB, A NEW LAW-DICTIONARY (unpaginated, under "Specialty") (2d ed. London 1732). Good bills were often not under seal if they were mercantile documents, see W. WEST, THE FIRST PART OF SYMBOLEOGRAPHY §§ 1659-61 (rev. ed. London 1615) (1st ed. London 1590); C. MOLLOY, *supra* note 26, at 288 (8th ed. London 1707), and therefore "mercantile specialties were given special treatment" in Lord Nottingham's Chancery. See H. NOTTINGHAM, PROLEGOMENA OF CHANCERY AND EQUITY 315 (D.E.C. Yale ed. 1965) (demonstrating that "specialties" were used widely for mercantile bills). As in the modern case of *Carruthers*, the Chancery looked beyond the form and to the parties where a "special" setting was alleged.

The Year Books show that Cowell's definition was the one originally used at common law. For example, covenant "required a specialty" but, as Holmes observed, "prescription was said to be a sufficiently good specialty." O.W. HOLMES, THE COMMON LAW 394 (1892); see Y.B. 32 & 33 Edw. I, 430. For a "special custom" attracting a "specialty," see 3 W. HOLDSWORTH, *supra* note 21, at 136 and cases cited. For another example, see J. COWELL, *supra* (unpaginated). Finally, Bracton never mentions the seal, but problems of "special" law by prescription, which supersede ordinary common law rules, are discussed at length, see 1 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND \*f. 180 (S. Thorne trans. 1968), and described as analogous to conditions which could be attached to the Roman *Stipulatio*. *Id.* at \*f. 17b; 3 W. HOLDSWORTH, *supra* note 21, at 90. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 208 (2d ed. 1898).

Merchants needed to convey purchasing power across international borders without the hazards attendant with carrying bullion. They also needed the convenience of having the right currency payable in the right place. Lastly, and perhaps most important, they needed bills of exchange as a vehicle for credit. This credit need, central to trade, was recognized in England by at least the 1560s.<sup>34</sup>

Limiting bills of exchange to merchants was still prevalent in 1622, at least in Malynes' view. By the time Marius' little treatise<sup>35</sup> appeared in 1651, however, bills of exchange were no longer tied, even in theory, to the

Such an historic use of "specialty" is consistent with three possible origins of the word as used at English law. Holmes, Holdsworth and Salmond all seem to assume that it came from the English Law. 3 W. HOLDSWORTH, *supra* note 21, at 90; J. W. SALMOND, *ESSAYS IN JURISPRUDENCE AND LEGAL HISTORY* 93-94 (1891); O.W. HOLMES, *supra*, at 394. But it would seem more likely that it came from the Law French, the language of the Year Book cases, where it is first found. "Specifer," in the old French, meant "to make mention of." E. NUTT & R. GOSSING, *LAW FRENCH DICTIONARY* (unpaginated) under "Specifier." (London 1718). Did mention of "special" law in the covenant originally attract such law? Indeed, the covenant originally had to "recite" the form. *Goddard's Case*, 76 Eng. Rep. 396 (1584). Was the same true of "mercantile specialties"? Certainly early mercantile bills did recite "special law," even where there was no seal, and the parties were labeled "Merchant" at every point and their names were given in the sample instruments contained in the *SYMBOLEOGRAPHY*. W. WEST, *supra*, at §§ 655-75. Even more intriguing would be a direct Latin origin from the medieval "Roman" law's interpretation of the original Institutes' use of "Specificatio" as a way of acquiring property. *INSTITUTES* II. I. 19, Comment 98-99 (7th ed. T.C. Sandars ed. 1883); W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW* 215-19 (3d ed. P. Stein ed. 1966). Such a connection would require more research. *But see* H. VULTEJUS, *IN INSTITUTIONES JURIS CIVILIS A JUSTINIANO COMPOSITAS COMMENTARIUS* 167 (4th ed. Frankfurt 1629) ("Specificatio, Quid Sit"). According to Buckland, the term "Specificatio" is entirely medieval. W. BUCKLAND, *supra*, at 215; *see also* H. JOLOWICZ, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 144 (2d ed. 1954). Could the idea of "making your own thing" have slipped to the Law French "specifer" and then into Cowell's meaning of "Specialty"? This argument, if proven, would serve to illustrate the importance of medieval Roman Law in shaping the Law French vocabulary, despite the traditional views of English legal historians to the contrary.

As late as 1803, "specialty" still had a dual meaning, with the narrower one, "deed under seal," given second. T. POTTS, *A COMPENDIOUS LAW DICTIONARY* 541 (1803); *see* G. JACOB, *supra* (under "Specialty"). How did it attain its "modern" narrow definition, even at a time when men like Holmes and Holdsworth knew and used the word in its proper historical sense? One likely possibility is that Blackstone used "specialty" only in the narrower sense. *See* 2 W. BLACKSTONE, *COMMENTARIES* \*465 (London 1766). I have a set of eighteenth-century student law notes that use the narrower definition; the student attributes Blackstone. There are undoubtedly other possible explanations.

<sup>34</sup> A. HARDING, *supra* note 23, at 119.

<sup>35</sup> J. MARIUS, *ADVICE CONCERNING BILLS OF EXCHANGE* (London 1651).

function of changing money for international transfer, and so-called "inland bills" between merchants in the same country were explicitly recognized.<sup>36</sup> Finally, by the end of the seventeenth century, bills of exchange could be used by anyone.<sup>37</sup> This expansion created serious theoretical problems for civilians and common lawyers alike,<sup>38</sup> yet it must have been a great relief to the merchant, whose ability to convey wealth and credit through bills of exchange no longer depended on the status of the parties involved.

Defining legitimate uses for bills of exchange was another issue confronting merchants. The old prohibitions against usury promoted bills of exchange, particularly as a means of establishing credit, although both Malynes and Molloy decried the so-called "dry exchange," or *cambio sicco*, and the "fictitious exchange," which were transactions designed solely to conceal a usurious loan.<sup>39</sup> By the time of Holt, and perhaps much earlier, bills of exchange were being used as vehicles for loans and insurance, quite apart from any need to transfer wealth.<sup>40</sup> As new uses developed, old restrictions grew cumbersome.

A third common concern among merchants related to the actual mechanics of bills of exchange. There was many a slip between the cup and the lip in these transactions and, in time, every conceivable mix-up occurred. For example, a typical arrangement can be understood in legal terms as involving the performance of two obligations: the undertaking between the remitter and the drawer, and the undertaking, if any, between the drawer and the drawee. The remitter conveyed value to the drawer in exchange for the bill. It was understood, at least between these two parties, that the bill would be accepted and paid by the drawee. The payee, the one intended to receive the money, was not party to any of these contracts, unless he was the original remitter, and his rights appeared to be entirely derivative—even assuming no negotiability. To make matters even more complex, drawees frequently did not have any formal relations with drawers, and some bills were honored, or not, entirely as a matter of discretion. Indeed, sometimes a bill would be "accepted for honor" by a party who was not the named drawee.<sup>41</sup>

Most bills were payable a specific time after the date of the bill (i.e., "at usance" or "double usance," a "usance" being the conventional time for exchange between two particular cities), or a certain number of days

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<sup>36</sup> 8 W. HOLDSWORTH, *supra* note 21, at 169.

<sup>37</sup> *Id.* at 169. See *Witherly v. Sarfield*, 89 Eng. Rep. 491 (Ex. Ch. 1690), in which a "Gentleman" traveling in Paris drew a bill on his father in England, who refused. Per Holt: "But this drawing a bill must surely make him a trader for that purpose, for we all have bills . . . which all must be avoidable, if the negotiating of a bill will not oblige." *Id.* at 492. My gratitude again to James S. Rogers.

<sup>38</sup> See *infra* notes 60-251 and accompanying text.

<sup>39</sup> G. MALYNES, *supra* note 26, at 201.

<sup>40</sup> See *supra* note 26 and accompanying text.

<sup>41</sup> See G. MALYNES, *supra* note 26, at 273; see also *supra* notes 141, 241.

"sight." The payee would present the bill to the drawee for "acceptance," frequently before the bill was payable. Once the drawee "accepted" the bill, usually by writing on it, a third relationship was established—the relationship between the acceptor and the payee. This relationship was one of reliance; the payee would naturally rely on the acceptor's promise to honor the bill at the specified time.<sup>42</sup>

A staggering number of things could go wrong in these three relationships—remitter to drawer, drawer to drawee, drawee/acceptor to payee—ranging from the ludicrous to the infinitely complex. The bill could be lost in transit, or lost by one of the parties before it was accepted. It could be lost by the drawer after it was accepted but before it was due.<sup>43</sup> It could also be stolen, forged, or damaged. One solution to these problems was to issue two or three identical bills with the condition that each was payable by the drawer unless one of the other bills in the set was accepted earlier.<sup>44</sup> Although each bill was usually numbered and indicated on its face that there were others, multiple bills increased the risk of error and forgery. On which party did these risks fall?

Other problems could arise. The payee, despite a "diligent search,"<sup>45</sup> might never find the drawee. The bill might be delayed "by contrary wind" beyond the period regarded as reasonable.<sup>46</sup> One of the parties to the bill may have died.<sup>47</sup> Bad faith and bankruptcy opened new vistas of complexity. A drawee, upon learning of the drawer's insolvency, might choose not to accept the bill. News of the drawer's insolvency might not reach the drawee until after acceptance. The drawer may have countermanded the bill, perhaps because the remitter had defrauded him or, as sometimes happened, because his servant had drawn the bill and absconded with the money.

The relationship between the acceptor and the payee was also full of potential difficulties. What constituted a valid acceptance was far from self-evident. Suppose the bill was "accepted," not by the drawee, but by his wife or servant, which happened fairly often. Was the acceptance good? What about conditioned acceptances, parol acceptances, or partial acceptances? Suppose the payee did not appear, but his agent or some other party came to call for the money. Or suppose the "payee" section of the bill was blank. Was the acceptance good under these circumstances? Did it bind the drawee? Could the drawee safely pay someone other than a named payee? What apparent authority should be required on either side?<sup>48</sup>

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<sup>42</sup> W. BEAWES, *supra* note 26, at 452. For a discussion of "usage," see G. MALYNES, *supra* note 26, at 268-69. Again, I am grateful to my colleague James S. Rogers for this citation.

<sup>43</sup> See 2 C. MOLLOY, *supra* note 26, at 105-07.

<sup>44</sup> *Id.* at 294-95.

<sup>45</sup> *Id.* at 112.

<sup>46</sup> *Id.* at 107-08.

<sup>47</sup> *Id.* at 297.

<sup>48</sup> See generally W. BEAWES, *supra* note 26, at 448-87.

The payee could bring an action against the drawer for repayment if the drawee did not accept the bill, but the bill had to be presented, rejected, and a formal "protest," usually notarized, made before recourse could be had back to the drawer. Inadequacy of protest was a standard defense of drawers, so its mechanics, too, became a source of numerous disputes. The protest had to be "reasonable." Due notice had to be given to the drawer, who only then would be responsible for repayment, together with "interest and charges."<sup>49</sup> These requirements sparked endless wrangling; the form and reasonableness of the protest were hotly contested as every conceivable complication arose. Who, if anyone, could protest the bill if the payee died?<sup>50</sup> Was a protest necessary if the acceptor had become insolvent before payment?<sup>51</sup>

These practical problems concerned merchants far more than any legal theory. Merchants wanted certain, clear mechanical answers to these problems, as well as a law that was sufficiently flexible and sensible to do practical justice in unforeseen circumstances.<sup>52</sup>

Yet the merchants eventually wanted one thing more—negotiability. They wanted to use bills of exchange, not as a limited medium for the transfer of money and credit, but as the money itself. For this to succeed, bills had to be freely transferable from named payees to other parties through endorsement. This was done by making the bill payable to the payee "on order" or "to his assigns" and by treating each transfer by endorsement as, in effect, the drawing of a new bill.<sup>53</sup> Thus if the payee, X, endorsed the bill to Y, X became a drawer and Y became the new payee; this could go on *ad infinitum*. Some bills contained so many endorsements that attachments had to be added just to make room for the new signatures.

But all this required that the drawee accept the bill. But no drawee in his right mind would pay to a fourth or fifth endorsement "payee" or "to bearer" without some very specific guarantees. For example, a drawee had to be assured that a bill could be validly transferred by endorsement and delivery alone. He also needed the benefit of an irrebuttable presumption that the bill was transferred for received value on "consideration," and that such value need not actually move from the holder of the bill.<sup>54</sup> This presented a severe theoretical barrier to a final "payee" trying to enforce a bill by a common law action of *assumpsit*.<sup>55</sup>

Finally, by the eighteenth century merchants became concerned about defects in the chain of endorsements that cut off rights of action against the

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<sup>49</sup> 2 C. MOLLOY, *supra* note 26, at 98.

<sup>50</sup> *Id.* at 197.

<sup>51</sup> *Id.* at 98 (noting that usually there was an affirmative answer to this question).

<sup>52</sup> See Coquillette, *supra* note 30, at 346-63.

<sup>53</sup> See 8 W. HOLDSWORTH, *supra* note 21, at 163.

<sup>54</sup> *Id.* at 167.

<sup>55</sup> See *infra* notes 153-57 and accompanying text.



drawee; a bona fide holder did not want to worry about anything besides the good credit of the drawee and original drawer. The protection of the holder in due course was the most massive doctrinal leap of all. It was the alchemy that turned paper, quite literally, into gold.<sup>56</sup>

But the doctrinal barriers were formidable. A simple, non-negotiable bill was bad enough, but here there could be dozens of secondary "drawers" and "payees," all with potential rights against each other in the event of default, as well as a final holder at the end of the line whose faith in the bill must be protected at all costs.

Who ought to be sued first if the chain broke? The most proximate endorser, the only party with whom the ultimate endorsee might have privity? The drawee? The original drawer?<sup>57</sup> What kind of notice was required? What form of protest? Did it make any difference if the bill was sold rather than endorsed?<sup>58</sup> Was an endorser an agent of the payee (*procurator in rem suam*)? How could one be certain that, on its face, the bill was in good order (*omnia rite acta*)?<sup>59</sup> Who would bear the risks? Who should benefit from the presumptions?

#### B. *The Early Legal Experience with Bills of Exchange in England*

The scope of these problems—both in practice and in theory—goes a very long way toward explaining the early English experience with bills of exchange. Without recapitulating all of the extensive research on this subject, five generalizations can be safely made.<sup>60</sup>

First, non-negotiable bills of exchange were used in England by the fourteenth century, undoubtedly inspired by commercial dealings with the Italian trading cities, where they were used even earlier.<sup>61</sup> Second, the bills, or at least the obligations they represented arising from the exchange transaction, were being enforced in the staple courts, in the borough courts, in the

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<sup>56</sup> The common law "black letter" characteristic of negotiable instruments requires an unconditional promise or order to pay a sum certain in money payable on demand or at a fixed or determinable future time. *See* *Manhattan Co. v. Morgan*, 242 N.Y. 38, 48, 150 N.E. 594, 597 (1926); 3 W. HOLDSWORTH, *supra* note 21, at 165. An instrument payable on a contingency is not negotiable, even after the event occurs in fact, nor is it negotiable if there is any promise in the instrument to do any act but pay a sum certain. *Id.* My colleague, James S. Rogers, is engaged in fundamental research on the distinction between early concepts of negotiability, which focused on the ability to transfer freely, as opposed to later notions, which focused on cutting off defenses against a holder in due course.

<sup>57</sup> 2 C. MOLLOY, *supra* note 26, at 90.

<sup>58</sup> *Id.* at 115-16.

<sup>59</sup> T.F.T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 667 (5th ed. 1956).

<sup>60</sup> *See supra* note 21 and sources cited.

<sup>61</sup> *See* F. SANBORN, *supra* note 21, at 220-21; T.F.T. PLUCKNETT, *supra* note 59, at 659-62; C. FIFOOT, *HISTORY AND SOURCES OF THE COMMON LAW* 320 (1949).

courts of the *cinque ports*, and, later, in the Admiralty Court.<sup>62</sup> Third, recent research by Baker and others suggest that bills of exchange were also being enforced in the common law courts through action on the case, although more as an issue of fact alleged in a general *assumpsit* count than pursuant to some separately articulated legal principle.<sup>63</sup> Finally, there is no evidence of a conscious incorporation of foreign legal doctrines as to the enforceability or assignment of the early non-negotiable bills. Nor is there evidence that doctrines of negotiability were thus imported. Rather, bills of exchange developed more as a "specialty"—a special law apart from the common jurisprudence, designed to accommodate the special needs and purposes of a particular group.<sup>64</sup>

By the middle of the fourteenth century, at approximately the time that bills of exchange were becoming prevalent among English merchants,<sup>65</sup> the

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<sup>62</sup> Again, I am grateful to James S. Rogers for the valuable distinction between enforcing "a bill" and protecting the obligation arising from the exchange relationship represented by the bill. The closest genuine early civil law influence would be through the Venetian and Genoese mercantile customs, to the extent these utilized a civilian basis. See R. WALKER, *THE ENGLISH LEGAL SYSTEM* 66 (4th ed. 1976). There was certainly a major Genoese trade with England, as the numerous "spoiler" cases indicate. See, e.g., 1 *SELECT PLEAS IN THE COURT OF THE ADMIRALTY* xxviii-xxix (Selden Soc'y Pub. No. 6, 1894) [hereinafter 1 *SELECT PLEAS*]. See generally S. SCACCIA, *TRACTATUS DE COMMERCIIIS, ET CAMBIO* (Rome 1618); B. STRACCA, *DE MERCATURA SEU MERCATORE TRACTATUS* (Venice 1553).

<sup>63</sup> See Baker, *supra* note 6, at 308-22.

<sup>64</sup> See *supra* note 33 and sources cited (describing the use and development of the concept of "specialty"). The earliest mention of bills of exchange in England were often oblique references in connection with more central concerns. Thus, "letter[s] of exchange" were mentioned in the statute of None Shall Take any Benefice of an Alien or Convey Money to Him, 3 Rich. 2 ch. 3 (1380), as one vehicle for draining money out of the Kingdom—widely regarded as a major economic evil at the time. See F. PULTON, *A COLLECTION OF SUNDRIE STATUTES* 205-06 (London 1632); see also R. POUND & T.F.T. PLUCKNETT, *READINGS ON THE HISTORY OF SYSTEM OF THE COMMON LAW* 226-33 (3d ed. 1927) (reviewing the opinion of Cockburn, C.J., in *Goodwin v. Robarts*, 10 L.R.-Ex. 337, 346 (Ex. 1875)).

<sup>65</sup> By 1360, bills payable to bearers or assigns were circulating among London merchants, often in connection with Lombard dealings, and they can be found from then on in the London Corporation records and other municipal collections. See Postan, *Private Financial Instruments in Medieval England*, 23 *VIERTEL-JAHRSCHRIFT FÜR SOZIAL-UND WIRTSCHAFTSGESCHICHTE* 26 (1930), reprinted in M. POSTAN, *MEDIEVAL TRADE OF FINANCE* (1973). (My thanks again to James S. Rogers). An excellent example is *Camby v. Surdouch*, London Corporation Records: Plea and Memoranda Roll, ref. A. 10, m.4 (A.D. 1364) (Equitable Jurisdiction), discussed in A. KIRALFY, *supra* note 23, at 244-45. The Borough court was puzzled by the exact form of the transaction, which was like a bill of exchange—payable in a different currency in a foreign country, but with the drawer and drawee being identical, which made it also like a promissory note. See *infra* note 98. Distinguished scholars, such as Joseph Story, would agonize about whether a bill of exchange could

Admiralty Court began to emerge as an important, specialized element of the English legal system.<sup>66</sup> The Admiralty's success and growth through the late fourteenth century is reflected by statutes enacted in 1389, 1391, and 1400 to curtail its influence.<sup>67</sup> These ultimately failed, and the beginning of the sixteenth century saw a powerful monarch, Henry VIII, dispensing with most statutory limits on the court's jurisdiction and providing it, and its civilian practitioners, with a clear mandate for growth and influence.<sup>68</sup>

Although bills of exchange had always been an important part of the Admiralty's jurisdiction, the Admiralty was neither the first, the last, nor even the most important forum for the development of negotiable commercial paper in England.<sup>69</sup> Rather, the Admiralty, as Beutel has demonstrated, was prominent in only one of the four stages of this development.<sup>70</sup> The first stage, consisting of the period before the adoption of the Statute of Staples in 1353,<sup>71</sup> was dominated by the development of Jewish obligatory notes and

have only two parties and whether the drawer and drawee had to be separate individuals. Story concluded that "[T]he Drawer may at once become Drawer, Payee, and Drawee; as, for example, if he should draw a Bill on himself, payable to his own order, at a particular place, naming no Drawee, and then should indorse it over, the Indorsee might sue him as Acceptor of the Bill, or as maker of a Promissory note, at his election." J. STORY, *COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE* 50 (3d ed. Boston 1853). On the other hand, the drawee and the payee had to be distinct persons, "for every Bill of Exchange presupposes a duty of the Drawee to pay the money to some other person than himself." *Id.* at 56.

That such bills were enforced by the borough courts, particularly when foreign traders were involved, has been established. A. KIRALFY, *supra* note 23, at 244-45; see *Goodwin v. Robarts*, 10 L.R.-Ex. 337, 346 (Ex. 1875); J. HOLDEN, *supra* note 21, at 21-29; R. POUND & T.F.T. PLUCKNETT, *supra* note 64, at 227.

<sup>66</sup> See T.F.T. PLUCKNETT, *supra* note 59, at 661; Steckly, *Merchants and the Admiralty Court During the English Revolution*, 22 AM. J. LEGAL HIST. 137, 141-42 (1978); F. WISWALL, JR., *THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800*, at 4-6 (1970). See generally Marsden, *Introduction to 1 SELECT PLEAS*, *supra* note 62, at xvii-xliii (explaining and summarizing early Admiralty cases).

<sup>67</sup> See *A Remedy for Him Who is Wrongfully Pursued in the Court of Admiralty*, 2 Hen. 4, ch. 11 (1400), *In What Places the Admiral's Jurisdiction Doth Be*, 15 Rich. 2 ch. 3 (1391), *What Things the Admiral and His Deputy Shall Meddle*, 13 Rich. 2, ch. 5 (1389), reprinted in A. KIRALFY, *supra* note 23, at 353-54; see also J. BAKER, *supra* note 24, at 107-08; C. FIFOOT, *supra* note 61, at 292.

<sup>68</sup> See Marsden, *supra* note 66, at xi-xix; Coquillette, *Legal Ideology and Incorporation I: The English Civilian Writers, 1523-1607*, 61 B.U.L. REV. 1, 13-19 (1981); 1 W. HOLDSWORTH, *supra* note 21, at 313-32 (1st ed. 1903); Steckly, *supra* note 66, at 141.

<sup>69</sup> See generally Beutel, *The Development of Negotiable Instruments in Early English Law*, 51 HARV. L. REV. 813, 813-47 (1938).

<sup>70</sup> *Id.* at 834-37.

<sup>71</sup> See *Statute of Staples*, 27 Ed. 3, stat. 2 (1353).

"fair bonds."<sup>72</sup> Although these instruments were assignable, they did not cut off bona fide purchasers for value and had nothing to do with the Admiralty.<sup>73</sup> There is also no evidence of civilian influence in the development of these instruments,<sup>74</sup> although they were to be found both inside and outside of England.<sup>75</sup> There was far more Roman law to be found in *Bracton* and other great common law treatises.<sup>76</sup>

The second stage began after the Statute of Staples and lasted until Henry VIII strengthened the Admiralty in the early sixteenth century.<sup>77</sup> The staple towns during this period not only boasted a fairly sophisticated recording system, but also permitted widespread assignment of promissory notes and bills of exchange.<sup>78</sup> Bearers were suing on assigned notes as early as 1414, and by 1437 something very close to a modern bill of exchange had evolved.<sup>79</sup> Payees and holders could recover against drawees and drawers, and against endorsers and transferrers, as well.<sup>80</sup>

Of course, this second stage was still vastly different from a modern system of commercial law. Almost all of these cases were recorded in the special statutory courts of the staple, and they involved merchants only.<sup>81</sup> Further, apart from the statutory scheme itself, and a few primitive books of customs such as the *Little Red Book of Bristol*,<sup>82</sup> there was no written law merchant, and no discernable doctrinal framework, either from civilian or

<sup>72</sup> See Beutel, *supra* note 69, at 814-21 (for a discussion of "fair bonds").

<sup>73</sup> See *id.*; see generally 1 SELECT CASES ON THE LAW MERCHANT 70-127 (Selden Soc'y Pub. No. 23, 1908); SELECT PLEAS, STARRS & RECORDS OF THE JEWISH EXCHEQUER 39, 94 (Selden Soc'y Pub. No. 15, 1901); 3 EXCHEQUER OF THE JEWS 264-65 (J. Jenkinson ed. 1929).

<sup>74</sup> For a discussion of the additional flexibility of civilian systems in mercantile cases and the difficulties they have experienced because of the "basic dichotomy between 'civil' and 'commercial' law," see Schlesinger, *The Uniform Commercial Code in the Light of Comparative Law*, 1 INTER-AM. L. REV. 11, 36, 40 (1959). According to Schlesinger, English "incorporation" of commercial law prevented those problems in Anglo-American systems. *Id.* at 40. For an analysis of the important growth of the theory of *ius gentium*, see Sutherland, *supra* note 20, at 158-59.

<sup>75</sup> The French Ordinance of Exchange of 1673 and the Ordinance of Marine Law and Insurance of 1681 were examples of complete "reception of the Law Merchant into national law." Sutherland, *supra* note 20, at 358. To English civilians, however, they were evidence of the *ius gentium*. See Coquillette, *supra* note 30, at 351-53; see also *infra* note 448.

<sup>76</sup> See 1 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND xxvi-xxxvii (S. Thorne trans. 1968).

<sup>77</sup> See Beutel, *supra* note 69, at 826-33.

<sup>78</sup> See *id.*

<sup>79</sup> See, e.g., 3 SELECT CASES, *supra* note 25, at 117; Beutel, *supra* note 69, at 830-31.

<sup>80</sup> Beutel, *supra* note 69, at 830-31.

<sup>81</sup> See *id.* at 826-32.

<sup>82</sup> THE LITTLE RED BOOK OF BRISTOL (F. Bickely ed. 1900) (original c. 1280). See Coquillette, *supra* note 1, at 298 n.24.

common law sources.<sup>83</sup> The staple system itself owed much to the experiences of the Jewish Exchequer, and the instruments involved were also influenced by the continental trade and practices, especially those of the Lombards.<sup>84</sup> But there was no doctrinal structure comparable to the "system" of the canon law or the civilian curriculum of the universities.<sup>85</sup>

This absence of a doctrinal structure was relevant to the practical problems of the merchants. Open-ended reference to the "custom of merchants," which was the extent of the incorporation of any "law merchant" achieved by the Statute of Staples and the staple system, did little to resolve the fundamental problem of negotiability.<sup>86</sup> In addition, these special courts were limited only to merchants and to the specific staple towns, and left no formal legal doctrines. The best that could be said for this "law" was that, without a conceptual framework, there was no legal doctrine that made things worse for merchants.<sup>87</sup>

The third stage of the development of commercial paper in England, the so-called "transitional period," occurred between 1525 and 1670.<sup>88</sup> Now the first treatises about law merchant emerged in England, and commercial cases began to be decided by centralized, national courts, including the Admiralty, rather than specialized local tribunals.<sup>89</sup> The Admiralty was also

<sup>83</sup> See Coquillette, *supra* note 30, at 347-48 & n.348.

<sup>84</sup> See Beutel, *supra* note 69, at 829.

<sup>85</sup> For a description of the civilian intellectual tradition in the English universities, see de Zulueta, *Introduction to THE LIBER PAUPERUM OF VACARIUS XV-XXII* (Selden Soc'y Pub. No. 44, 1927); Coquillette, *supra* note 68, at 15-17 (1981).

<sup>86</sup> See, e.g., Statute of Staples, 27 Ed. 3, stat. 2 (1353).

<sup>87</sup> See C. KEETON, *ENGLISH LAW—THE JUDICIAL CONTRIBUTION* 179 (1974). As Keeton put it:

The law merchant, thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders, in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law, with a view to the interests of trade and the public convenience, the courts proceeding herein on the well-known principle of law with reference to the different departments of trade. Courts of law in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what was before usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the Common Law, and may thus be said to form part of it.

*Id.*

<sup>88</sup> Beutel, *supra* note 69, at 834-87.

<sup>89</sup> Beutel defined this period according to the rise and fall of the Admiralty. His thesis is that Henry VIII gave the Admiralty and its civilian practitioners a fundamental opportunity to develop the commercial law. *Id.* at 834-36; see also Steckley, *supra* note 66, at 141-47; Yale, *A View of the Admiralty Jurisdiction: Sir Mathew Hale and the Civilians*, in *LEGAL HISTORY STUDIES* 1972, at 86, 89-92 (D. Jenkins ed. 1975).

recognizing bills of exchange as fully negotiable,<sup>90</sup> and civilian law practice and juristic writing were at a high point.<sup>91</sup> Although this stage represented a golden opportunity for the civilians to develop the commercial law, it ended in the civilian failures of the 1670s.<sup>92</sup>

The fourth and final period in the development of negotiable instruments, according to Beutel, dated from the first common law prohibitions to the Admiralty in the late 1500s until the epoch of Lord Mansfield. This was largely a period of self-contained common law development.<sup>93</sup> The Admiralty was, according to Beutel, from the beginning, separate from this line of development and eventually became irrelevant.<sup>94</sup>

Beutel's thesis concerning this insular common law development of negotiable instruments anticipated Baker's more recent discoveries.<sup>95</sup> The only significant difference is that Baker asserts that this development began not in the early 1600s, as Beutel assumed, but much earlier, at approximately the same time that the rival Admiralty practice was flourishing.

So here we have an excellent test. The critical period appears to have been roughly 1525 to 1675. The demands of a thriving English commerce for a cash substitute and a vehicle for credit and insurance presented a real challenge. How did the Admiralty and the common law courts respond, both practically and juristically?

To set an appropriate starting reference, let us take a look at some bills of exchange enforced in the staple and borough courts during what Beutel would call the "second period."<sup>96</sup> They share some common characteristics. Many involved Lombards, and many involved the wool trade. They could be both three- or four-party bills, as the drawer and drawee were occasionally identical persons. The rates of exchange were often predetermined and set out in the bill, and often payable quite soon after sight. The earliest bills were payable to a specific payee "or to his attorney," but later bills were payable to "the bearer" or "the bringer of this letter."<sup>97</sup> These bills, however, were neither negotiable cash substitutes nor vehicles for sharing in the risk of a venture.<sup>98</sup> Rather, they functioned both to transfer wealth in appropriate

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<sup>90</sup> Beutel, *supra* note 69, at 836; *infra* notes 99-127 and accompanying text.

<sup>91</sup> See Coquillette, *supra* note 68, at 37-39; Coquillette, *supra* note 30, at 320-46.

<sup>92</sup> See Coquillette, *supra* note 1, at 323-42.

<sup>93</sup> Beutel, *supra* note 69, at 837-45.

<sup>94</sup> *Id.* at 837.

<sup>95</sup> Compare *id.* at 837-45 with Baker, *supra* note 6, at 320-22; see *supra* text accompanying notes 6-16.

<sup>96</sup> Beutel, *supra* note 69, at 826-33.

<sup>97</sup> See *id.*

<sup>98</sup> See, e.g., Camby v. Surdouch, reprinted in A. KIRALFY, *supra* note 23, at 244. The drawer of the bill, one Surdouch of Lucca, received from one Camby of Pistoia in London, 30 pounds "by Exchange." The bill named Vane "or his attorney" as payee in Bruges, to be paid in Flemish crowns "worth 3 shillings each" the "15th day after sight." *Id.* Vane delivered by letter to one John Paul for collection in

currencies without transporting bullion and, more importantly, to provide "float" or credit in international transactions.

Such bills of exchange were enforced with little or no attention to legal doctrine. They were simply the special affairs of commerce, and the mercantile custom of fair dealing was the "law." This mercantile custom, however, had only fragmentary rationales, at least as explicitly expressed. Further, what custom existed had to have been cosmopolitan, since bills of exchange of this classic sort were, by definition, international. But there was not a scrap of Roman law related to these bills, and they certainly were not negotiable instruments. There was no evidence that a bona fide purchaser for value could cut off the legitimate defenses of a drawer.

Now let us look at some early bills of exchange enforced in the Admiralty. First, most involved ships.<sup>99</sup> Indeed, some of the earliest known Admiralty bills<sup>100</sup> were directly secured by ships.<sup>101</sup> One of the earliest recorded bills of exchange in the Admiralty, dated 1538, essentially substituted the ship for the drawer.<sup>102</sup> By 1541, this practice had become explicit in certain cases.<sup>103</sup>

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Bruges, but Nicholas did not pay. In the Court of the Mayor and Alderman of London, Nicholas said that he had paid to a certain "Paul John." *Id.* Camby replied that "he assigned Nicholas to pay the money to John Paul and not to Paul John or any other person than John Paul alone." *Id.* The London Corporation Records show that a "settlement" was negotiated whereby "Nicholas should procure certain Letters of Payment and satisfaction of the said debt from the person to whom the debt was paid, and also letters from the authorities of the Town of Bruges authenticating the payment of the said debt." *Id.* at 245. Regrettably, it is unclear if Nicholas paid to the bearer of the "Letter of Exchange," or the exact nature of the problem, but exchange arrangements were clearly enforceable by the London court as between merchants. The only issue was whether the exchange obligation had been properly discharged.

In 1437, in *Burton v. Davy*, the Mayor's Court of London gave judgment directly both to the payee and to a bearer of a letter of exchange. 3 SELECT CASES, *supra* note 25, at 117. The drawer, a John Audeley in Bruges, addressed the bill to a London mercer, Elias Davy. *Id.* The bill was for 30 pounds "by exchange," payable at London on March 14, to one John Burton "or to the bearer of this letter." *Id.* This bill was typical. There were many, drawn in Bruges or Calais in the wool trade, payable in sterling to "the bearer" or to "the bringer of the letter." See Beutel, *supra* note 69, at 826-33.

<sup>99</sup> In the first half of the sixteenth century the local mercantile courts, although severely restricted in 1477 and 1483 by the statutes of Edward IV and Richard III, were not extinct. *Id.* at 833; see 1 W. HOLDSWORTH, *supra* note 21, at 300-37 (1st ed. 1903). We must also bear in mind Baker's thesis, that bills of exchange became enforceable early at common law as "part and parcel of the general development of *assumpsit*." Baker, *supra* note 6, at 310.

<sup>100</sup> Systematic Admiralty records began in 1524. See T.F.T. PLUCKNETT, *supra* note 59, at 661.

<sup>101</sup> See *id.*

<sup>102</sup> 2 SELECT PLEAS, *supra* note 28, at 65.

<sup>103</sup> 1 SELECT PLEAS, *supra* note 62, at 92.

The prevalence of this practice, which contributed to the success of the Admiralty, was attributable to the maritime remedy of "bottomry" or, to use the more elegant and civilian term, "hypothecation." Bottomry was essentially an *in rem* proceeding against a ship pledged as security for repairs, necessities, and, in some jurisdictions, cash advances to replace or supplement goods—all for the "necessary use of the ship," *in usum et utilitatem ac necessitatem dicte navis*.<sup>104</sup> The rationale was simple: it was fair to bind the ship, and thus the ship's owners, for contracts that secured vital necessities in distant ports where, unless the money was made available, the venture could fail. The master of the ship, in desperate need of cash, would pledge the ship, its equipment, and his own goods as collateral. The debt would be payable almost immediately upon the successful completion of the voyage, usually within twenty days and sometimes within twenty-four hours.<sup>105</sup> The writing evidencing the deal, the *quoddam suum scriptum obligatorium ad modum chirographi sua manu propria subscripti*, would promise payment in the currency of the port of arrival.

The bill of exchange was a perfect vehicle for this arrangement. Because of the risks involved, including the very real possibility of disaster at sea, the interest demanded by the lender would be high, most likely usurious. The bills sheltered such usury by masking the true gain in the rate of exchange, and the risk of the voyage warranted the profit. Also, the bill of exchange was widely enforceable. If it could be enforced in a forum that could proceed *in rem* against the boat as well, why that would be ideal!

Many bills of exchange enforced in the sixteenth-century Admiralty took this form. The bill was drawn by the master of the vessel, and was payable to the local agent providing the needed funds, or to his attorney, or to bearer. The purpose of the loan, *in usum et utilitatem ac necessitatem dicte navis*, was carefully recorded, as well as the liability of the ship itself, although there were frequently other personal sureties given that were located at the ultimate destination.<sup>106</sup> Often, two or three copies of the bill were executed, with copies sent by other ships to the creditor's agent or assignee in the port of destination. The owner of the ship would pay the first presented. Otherwise the ship, along with tackle and master's goods, would be seized through the Admiralty.<sup>107</sup>

This process had many advantages. First, the bill of exchange, secured by bottomry, offered a convenient way to speculate on a voyage with a minimum of harrassment. If the ship made it to its destination, the gain would be great. If it was lost at sea, there might still be some recourse against the owner. Further, carefully drafted bills of exchange could be used to specu-

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<sup>104</sup> *Id.* at 55.

<sup>105</sup> *Id.*

<sup>106</sup> See 2 SELECT PLEAS, *supra* note 28, at 7, 65-77, 126-27, 192-95.

<sup>107</sup> See 1 SELECT PLEAS, *supra* note 62, at 38-41, 92-94.



late on the voyage.<sup>108</sup> For example, suppose the voyage was particularly hazardous, and the owners wished to reduce their exposure. They could finance part of the voyage with a bill of exchange, pledging the ship, but payable only after the ship had arrived safely. The payee would specifically incur "the peril and adventure" of the voyage, and the highly advantageous rate of exchange would, in effect, be the return.<sup>109</sup>

It is not, therefore, surprising that the first insurance policies appeared close in time and in form to the earliest known bills of exchange, or that they were closely associated with Lombard Street merchants. The earliest known English insurance policy was actually written in Italian with an English translation attached.<sup>110</sup> Nor should it be surprising that insurance disputes concerning ships appeared as early as 1545 in Henry VIII's revitalized Admiralty.<sup>111</sup>

As with non-maritime bills of exchange, however, the Admiralty ultimately proved unsatisfactory for the determination of insurance causes.<sup>112</sup> But the problem was certainly not with the instrument itself. In the years 1533 to 1564, there were many examples of bills of exchange used for both maritime speculation and insurance, and they were consistently enforced by the Admiralty.<sup>113</sup> The old objectives of the bills of the Staple courts, the transfer and exchange of money for its own sake and for mercantile credit,

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<sup>108</sup> See *supra* note 26; Vance, *The Early History of Insurance Law*, in 3 SELECT ESSAYS, *supra* note 21, at 98-116.

<sup>109</sup> See 2 SELECT PLEAS, *supra* note 28, at 75.

<sup>110</sup> See Vance, *supra* note 108, at 110; 3 W. HOLDSWORTH, *supra* note 21, at 283. To be true insurance, a premium must be paid, and the insured amount paid out only if a loss occurs. Some early bills were high risk financing, rather than true insurance, as the full sum was paid out at the beginning of the voyage, to be repaid at safe arrival. For this observation, I am again indebted to James S. Rogers. The first true insurance developed in Italy in the fourteenth century. See 3 THE CAMBRIDGE ECONOMIC HISTORY OF EUROPE 99-100, 209-10 (M. Postan ed. 1963). There were pure insurance transactions in the London Mayor's Court Rolls as early as the fifteenth century. James S. Rogers brings to my attention CALENDAR OF PLEA AND MEMORANDA ROLLS 1413-1437, at 208-10 (A. Thomas ed. 1943) (entry of March 10, 1427).

<sup>111</sup> Vance, *supra* note 108, at 110.

<sup>112</sup> See *id.* (observing that "for some reason, not easily understood, the courts of the Admiralty did not prove satisfactory tribunals for the determination of insurance causes"). The first English insurance act was passed in 1601. See An Act Concerning Matters of Assurance Used Among Merchants, 43 Eliz., ch. 12 (1601); G. MALYNES, *supra* note 26, at 105-06; 8 W. HOLDSWORTH, *supra* note 21, at 286-89; Vance, *supra* note 108, at 113.

<sup>113</sup> See 1 SELECT PLEAS, *supra* note 62, at 38-41, 92-94; 2 SELECT PLEAS, *supra* note 28, at 65-77, 126-27.

were relatively inconspicuous in the fifteenth-century Admiralty records.<sup>114</sup>

While these Admiralty bills were not negotiable in the modern sense, many were assignable, and often the assignees ended up being the plaintiffs. The typical formula for an assignment included the name of the payee, and

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<sup>114</sup> Of course, there were exceptions. Some of the early Admiralty bills concerned "merchaunt of the staple" and closely resembled the instruments recognized by the borough and staple courts two centuries before. *See, e.g.*, 1 SELECT PLEAS, *supra* note 62, at 38 (providing an example of a bill dated 1533). But as the sixteenth century progressed, more and more bills concerned ships, insurance, and venture capital. Take, for example, the experience of the ship "St. Michael" of Barnstable in 1541. *Id.* at 92. One John Semer, a factor of Messrs. Nicholas Thornes and Thomas Ballarde, "merchants of the town of Bristol," was residing in Messina, Sicily, where he was described as "noble John Semer merchaunt also of England dwelling in Messyna." *Id.* at 93-94. In this "noble cytty . . . charged withe wyne Mallmesye" was the good "shypp Saynt Mighell." Cash was needed to complete the voyage. John Semer advanced against a bill of exchange "ducats clxxxij of goolde . . . whiche saide ducats . . . shall go in all this viage at the adventure and perryll as well of god as of the see." *Id.* at 93-94. Only if "shall god willyng" the ship "saffely arryve" in the defined ports "and doste case her ffurste anke and xxiii hours expyred" are the ducats "or their juste valew in Englyshe monney" due to the bill's payee, the brother of John Semer's English partner, William Ballarde of Bristol. The debt would be payable in "xxx daies," but the obligation, as a matter of risk, would be fixed on arrival plus one day. *Id.* The bill was drawn by the ships "scribe," John Andreas and Hohn Aborow "patron of the shypp." *Id.* The bill concluded with joint and several covenants of Andreas and Aborow to pay the money, with power for the lender to seize the debtors and their goods, "but not mentioning the ship expressly." *Id.* Nevertheless, a first decree was obtained in Admiralty on default by Semer's English patrons against the ship itself, the freight, and the ship's "apparel." *Id.* at 92. Interestingly, the bill was to a specific payee, with no "bearer," or "attorney" clause. The issue was not negotiability, but speculation and security.

There were many such bills. Take the bill drawn by "Jamys Castelyn of London capitayn of the shipe namyd Sencet George being at ankor" close to Cadiz, Portugal. 2 SELECT PLEAS, *supra* note 28, at 65. The bill was secured by "my person and goodes . . . the person and goodes of . . . my brother and *especiallly the sayed shipe her freight and apparell in especiall.*" *Id.* at 66-67 (emphasis added). There was also "for your more suertye" a "Williams Parkear mercaunt of Yngland which is present and carye the marchaundizes in the sayed shipe the whiche being present did accept the suertye sshipe." *Id.* at 67. The bill also contained clauses giving "power complete and sufficient unto all Justyces and Judges of whatsoever cities townes or villages where so ever or beffore whome this writing shalbe showid or sene . . . and of every of them we do submytt our sellffes with our personys and goodes." *Id.* at 67. But when trouble struck, the payee's assign, Richard Austen, went to the Admiralty to secure the ship *in rem*. *See id.* at 65, 68. It made no difference if the parties to the bill were not English or even if they were foreign governments. *See, e.g., id.* at 192-95. Nor did it matter that the bill was not in English, or that the bill was not to be performed in England. Indeed, many bills in the Admiralty records are in foreign languages, or in Latin. *See, e.g., id.* at 76 (a Dutch bill).

the words "his assynys,"<sup>115</sup> or "hys certyn attorney,"<sup>116</sup> or "ys assygneres."<sup>117</sup> The bills also often cited the risks assumed by the payee, such as the safe passage of the ship.<sup>118</sup> Because of the risks involved in passage, two or three "bylls of one tenor" were usually executed, "the one to be complyde the other[s] to stande ase yoyde."<sup>119</sup> The bills were commonly sent by different ships, presumably so that the payee would be ready on arrival or so that the bill would be in the custody of someone other than the drawer or the drawee.

Some of the bills were "bearer bills," that is, payable to the payee, "or to the bringor of this presentt,"<sup>120</sup> or to "the lawfyll brynger,"<sup>121</sup> or "bringer hereof."<sup>122</sup> These bearer bills were enforced when they "came to the hands and possession" of undesignated third parties, apparently without endorsement.<sup>123</sup>

Oddly enough, given the unique value of bottomry to the Admiralty's bills of exchange jurisdiction, the courts were reluctant to make absent part-owners of a ship liable, to the extent of their shares in the ship, for contracts which the part-owners did not sign, or even know about until later. Thus, in *Cogley v. Taylor*,<sup>124</sup> the court bound the ship Margaret "upon a certain civil and maritime contract," but only "as regards the part of [the ship] of which [the drawer] was owner and possessor."<sup>125</sup> Indeed, the Admiralty orders, at least those edited by Marsden, were singularly absent of rationales or doc-

<sup>115</sup> 2 SELECT PLEAS, *supra* note 28, at 68.

<sup>116</sup> *Id.* at 69, File 16, No. 125-26 (1543).

<sup>117</sup> *Id.* at 73, File 33, No. 133 (1557). *See also id.* at 66, File 6, No. 10 (1536) ("or unto whom shalbe for him [payee] that ys to saye . . ."). Some bills were to specific payees only. *See, e.g., id.* at 69, File 17, No. 70-69 (1540) ("pay to D. Barnard Calvalcanti one hundred and eighteen pounds eighteen shillings gross in current money"); *id.* at 70, File 22, No. 32 (1553) ("pray you to paye by this my first bill of exchange . . . to the worshipfull Nicholas Bell"); *id.* at File 24, No. 63 (1554) ("dothe knowlyge my selfe to owe unto Harye Browne merchant of London the some of therty fyve poundes"); *id.* at 73, File 33, No. 133 (1557) ("dothe knowlege my sellfe for to be in dytted to David Carlotte of London"); *id.* at 72, File 32, No. 43 (1561) (most paye . . . to Lewes Lopes merchaunt Portingall beinge in Anworpe twenty duckets").

<sup>118</sup> *Id.* at 69, File 6, No. 16 (1538) ("sayed Rychard Awsten beerys the adventure of the fore sayde . . . unto him [the ship's] saffe aryvyng").

<sup>119</sup> *Id.* at 68, File 6, No. 16 (1538).

<sup>120</sup> *Id.* at 70, File 18, No. 46-47 (1549).

<sup>121</sup> *Id.* at 71, File 25, No. 71-72 (1553).

<sup>122</sup> *Id.* at 73, File 33, No. 192 (1562). The wording is "bringer hereof," though "brynger hereof" was also used. *See id.* at 73, File 35, No. 323-324 (1563).

<sup>123</sup> *Id.* at 126-27, Denaker v. Mason, File 35, No. 116 (1564).

<sup>124</sup> *Id.* at 7, File 16, No. 56 (1548).

<sup>125</sup> *Id.*

trinal structure for secured transactions through bottomry, assignability of bills, liability of drawers and drawees, or anything else the Admiralty was doing regularly with bills of exchange. Further, the cases demonstrated no real introduction of such doctrinal structure, even after much time passed. True, cases before 1540 revealed the greatest influence of the staple and borough court forms of the preceeding centuries, but by 1540 the "bottomry bill" was fully developed, and little was added by way of negotiability or security. This state of affairs lasted until after the Settlement of 1575 assured the Admiralty of a continuing jurisdiction, albeit an embattled one, over foreign bills of exchange.<sup>126</sup> Beutel has argued that "[w]ithout the writs of prohibition by the common law courts," which had commenced seriously by the late sixteenth century, the Admiralty "probably would have received all these [commercial paper] cases."<sup>127</sup> But he gives no particular reason why this should be true, and there is no evidence that this would have occurred in those cases where the Admiralty's *in rem* power over ships was useless.

Were the common law courts any better? The conventional view of the common law "incorporation" of the bill of exchange follows the explanation originally provided by Holdsworth<sup>128</sup> who, in turn, had built on an extraordinary essay written by William Cranch in 1804.<sup>129</sup> According to Holdsworth, the first attempt to enforce bills of exchange at common law was reflected in a pleading in Rastell's *Entries* in 1564, with later sample pleadings dating from 1586, 1595, and 1596.<sup>130</sup> Holdsworth noted that "in *Martin v. Boure* (1602)—the earliest reported case on a bill of exchange—assumpsit was again adapted to enforce the rights of some of the parties, and again with success."<sup>131</sup>

The key words here are "some of the parties." Certain relationships were harder for the common law to handle than others. For example, let us assume a case like the precedent in Rastell's first edition. There the remitter conveyed value to the drawer who, in return, promised that the drawee would pay a certain sum to the payee, who was a factor of the remitter. If the drawee did not pay, then the drawer must do so "with all damages and interest thereof."<sup>132</sup> Thus, Rastell's case was ostensibly an action by the remitter against the drawer for nonpayment by the drawee.

It is tempting, yet misleading, to define conceptual difficulties in cases

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<sup>126</sup> See Coquillette, *supra* note 1, at 324-42; Coquillette, *supra* note 30, at 323-36.

<sup>127</sup> Beutel, *supra* note 69, at 813.

<sup>128</sup> See 8 W. HOLDSWORTH, *supra* note 21, at 159-70.

<sup>129</sup> Cranch, *supra* note 21.

<sup>130</sup> 8 W. HOLDSWORTH, *supra* note 21, at 159; see Cranch, *supra* note 21; see also 8 W. HOLDSWORTH, *supra* note 21, at 159 (discussing another successful example in 1586 set out in JOHN HERNE'S PLEADER (London 1657)).

<sup>131</sup> 8 W. HOLDSWORTH, *supra* note 21, at 159.

<sup>132</sup> W. RASTELL, COLLECTION OF ENTRIES 10b (1564), reprinted in Cranch, *supra* note 21, at 77.

such as this by reference to modern notions of privity and consideration. These doctrines, however, did not exist in their modern form during the relevant period.<sup>133</sup> Thus, it would be easy to say that the initial relationship of the remitter to the drawer was a natural candidate for the developing *assumpsit* remedy. Certainly, there was privity, an undertaking, and value received for the promise. In fact, however, a remitter's right to be repaid by a drawer on protest of the bill by the drawee was, as Baker points out, "effectively a quasi-contractual claim, which could only be accommodated within *assumpsit* by fiction."<sup>134</sup> For example, what if the drawer had dutifully forwarded the money or other appropriate value to a dishonest drawee?<sup>135</sup> Only with some difficulty it was held that "[b]y the common law a man may resort to him that received the money if he to whom the bill was directed refuse."<sup>136</sup> Even in 1691, Holt had to emphasize that "the drawer is chargeable by the value received [of the remitter]."<sup>137</sup>

More manageable in *assumpsit* was the undertaking between a payee and a drawee who had "accepted" a bill, that is, agreed to pay it when due, usually by adding a "subscription," or written annotation, to the bill. The doctrinal difficulty presented by this relationship was the usual absence of any value paid by the payee to the acceptor in return for the promise. Initially, this was overcome by treating the payee as a factor or agent of the remitter, although in fact the remitter often was the payee.<sup>138</sup> While it was held "that the payee could not sue in debt or *indebitatus assumpsit*," action on the case was permitted; the "payee could sue the acceptor on the basis that his acceptance amounted to an undertaking to pay," either as a matter of general or local custom.<sup>139</sup> Even Rastell's early *Entries* had a declaration by a payee against an acceptor.<sup>140</sup>

Because many drawees did not receive value to "accept" from the drawer or from anyone else,<sup>141</sup> actions against a drawee could be conceptually hazardous. The real reason for enforcement was that the payee and, as we shall see, often a string of endorsees, may have relied on the acceptor. The

<sup>133</sup> See Baker, *supra* note 6, at 311 (observing that the doctrine of privity was "still of very uncertain scope" even by the seventeenth century).

<sup>134</sup> *Id.*

<sup>135</sup> This was not uncommon. See *Maynard v. Dyce*, KB 27/1125, m.110 (1542), cited in Baker, *supra* note 6, at 311-12.

<sup>136</sup> *Woodward v. Rowe*, 84 Eng. Rep. 67, 67 (K.B. 1666), quoted in 8 W. HOLDSWORTH, *supra* note 21, at 161 n.4; see W. RASTELL, *supra* note 132, at 338b.

<sup>137</sup> *Mogadara v. Holt*, 89 Eng. Rep. 597, 598 (K.B. 1692), quoted in 8 W. HOLDSWORTH, *supra* note 21, at 161 n.4.

<sup>138</sup> Compare 8 W. HOLDSWORTH, *supra* note 21, at 162, with Baker *supra* note 6, at 311 (as to error of looking for "privity" doctrine in such early transactions).

<sup>139</sup> See Baker, *supra* note 6, at 310 & n.60.

<sup>140</sup> See Cranch, *supra* note 21, at 77.

<sup>141</sup> See J. HOLDEN, *supra* note 21, at 41, 49, 137-38, 185 (discussing "acceptance for honor"); see also G. MALYNES, *supra* note 26, at 273; *infra* note 241.

“factor” or “agency” approach was a legal fiction when applied to the relationship between the drawer and the drawee. Thus a drawee who did not accept a bill was liable to the drawer only, and was not liable to payees or endorsees. By the time of the classic case of *Oaste v. Taylor*,<sup>142</sup> decided in 1612, the common law had made true acceptors liable to payees. But even then it was moved in arrest of judgement that “the Defendant is not averred to be a Merchant at the time of the Bill accepted.”<sup>143</sup> Liability was not, however, premised on general principles of fair dealing or reliance, but on the “speciality” of the mercantile custom, the *secundum usum mercatorum*, and even this rationale remained conceptually murky.<sup>144</sup>

The legal relationship of the drawer to the drawee was also not clearly defined. Holdsworth argued that “their relations were based, either upon the fact that the drawee was the agent of the drawer, or that he is the debtor of the drawer.”<sup>145</sup> But this really would not do. Consider, for example, the conceptual problems of the defense in the famous case of *Martin v. Boure*.<sup>146</sup> Martin drew a bill in exchange for approximately 283 pounds received in England. The bill was addressed to Boure, who resided in Aleppo, Spain, instructing him to pay one Harris 1326 “Dollars called Royals of eight.”<sup>147</sup> Boure refused, and Martin sued. Boure pled “non assumpsit,” but he lost in the King’s Bench. On appeal to the Exchequer Chamber, Boure argued that “because the considerations are executory, [and] ought to be precisely alledged to be performed according to the agreement,” he had two defenses.<sup>148</sup> First, Martin’s bill was not “signed with his hand,”<sup>149</sup> which was required under *secundum usum mercatorum*. Second, it required Boure to pay the 283 pounds in equivalent dollars, which, he argued, was not a good assumpsit, “for he thereby ties himself to pay that kind of money, and not generally.”<sup>150</sup> As Boure reasoned:

“[F]or where I have election to pay it in any money,  
he ties me to pay it in that kind of money only, so  
as he takes from me my election in what money I will  
pay it, and makes me peradventure to be at the charge  
of exchanging it into that money.”<sup>151</sup>

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<sup>142</sup> 79 Eng. Rep. 262 (K.B. 1612).

<sup>143</sup> *Id.* at 262.

<sup>144</sup> See *supra* note 33 and accompanying text for a discussion of “specialty.”

<sup>145</sup> 8 W. HOLDSWORTH, *supra* note 21, at 162; see *Cramlington v. Evans*, 86 Eng. Rep. 456, 457 (K.B. 1691).

<sup>146</sup> 79 Eng. Rep. 6 (K.B. 1602).

<sup>147</sup> *Id.* at 6. This was certainly one of the earliest references to dollars in a law suit, although hardly the last.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 7.

<sup>151</sup> *Id.*

In a sense, Boure was right. He was not really a debtor if the consideration was all executory. Nor was he really an agent—at least in the sense that he was not the alter ego of the drawer. But the Exchequer Chamber made short work of Mr. Boure and affirmed on the allegation of the *secundum usum mercatorum*.<sup>152</sup>

The relationship between the payee and drawer was even more difficult, particularly if viewed in the light of what would later become the norms of privity and consideration. The payee and drawer may not have dealt with one another, and no value was given by the payee to support any undertaking by the drawer. Yet the courts tenaciously followed mercantile custom and continental law, “basing the payee’s right of recourse against the drawer, in the event of non-acceptance or of non-payment by the acceptor, upon the existence of some sort of agency between the payee and the person who had given value to the drawer.”<sup>153</sup>

Now this really was a fiction and the “agency” was often merely presumed. By 1660 and the case of *Woodward v. Rowe*,<sup>154</sup> the presumption became explicit. Finally, by the time of Holt in 1700, the fiction was abandoned and a new notion invented: “the act of drawing a bill imple[d] a warranty to the payee that it will be paid.”<sup>155</sup> As Holdsworth keenly recognized, such a warranty, in addition to conferring contractual rights, made a bill operate as a “conveyance.”<sup>156</sup> The common lawyers, however, saw no reason to develop the conceptual ramifications of this implied warranty. Once again the day was saved by simply reciting the “custom of the merchants.”<sup>157</sup>

Finally, there was the hardest task of all: defining the rights of endorsers and endorsees “to order,” and of bearers of bills made out to “A or bearer.” This was the issue of negotiability, pure and simple. Privity goes by the boards in fully negotiable instruments, as does consideration, which becomes a rebuttable presumption.<sup>158</sup> The three key elements—transfer by endorsement and delivery, the presumption of consideration, and, eventu-

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<sup>152</sup> *Id.*

<sup>153</sup> 8 W. HOLDSWORTH, *supra* note 21, at 162. Early assumpsit actions implied “an undertaking by the drawer [to the payee] that the drawee would pay,” again based on the *secundum usum mercatorum*. Baker, *supra* note 6, at 310.

<sup>154</sup> 84 Eng. Rep. 84 (K.B. 1666), noted in 8 W. HOLDSWORTH, *supra* note 21, at 162.

<sup>155</sup> See 8 W. HOLDSWORTH, *supra* note 21, at 162 & n.7 and cases cited.

<sup>156</sup> *Id.* at 163.

<sup>157</sup> *Id.* For the eventual development of this idea, see Bills of Exchange Act, 45 & 46 Vict., ch. 61, §§ 54-56.

<sup>158</sup> See *id.* at 143-44, 167 (discussing the “presumption of consideration”). For Lord Mansfield’s views, see J. HOLDEN, *supra* note 21, at 133-39. As Holt stated, “If the drawer mention it ‘for value received,’ then he is chargeable at common law.” *Cramlington v. Evans*, 89 Eng. Rep. 410 (K.B. 1685), noted in 8 W. HOLDSWORTH, *supra* note 21, at 167 n.3.

ally, the cutting off of defenses against a bona fide endorsee for value—demanded major conceptual innovation. But such innovations did not occur on a juristic plane until Lord Mansfield.<sup>159</sup> Meanwhile, ad hoc negotiability had become so established that, by 1729, *Jacob's Law Dictionary* stated that a bill of exchange “generally passes as money.”<sup>160</sup>

The process began by distinguishing bills of exchange payable to “A or bearer” from those payable to “A or order” or to “A or assigns.” Only the last two permitted transfer by endorsement. A “bearer” bill entitled the bearer to sue only in the name of the payee and not in his own name, although payment to the bearer discharged the acceptor.<sup>161</sup> The drawbacks were obvious. Because there was no chain of endorsements, a lost bill could be cashed by a stranger. Worse, the lack of endorsements meant no record of prior holders. As a result, because endorsees had potential rights against prior endorsers, common law judges began to regard each new endorsement as the drawing of a new bill with the endorser as drawer and the endorsee as payee, although “custom” insisted that endorsees first seek recourse against the drawer if the drawee failed to pay. This doctrine reflects ad hoc practice rather than juristic theory.<sup>162</sup>

The relationships were also enforceable by what was, even at best, an irregular cause of action. Assumpsit was the remedy against the drawer. As we have seen, neither *indebitatus assumpsit* nor an action in debt was available to the payee against the acceptor, but only an action on the case founded on the assumpsit.<sup>163</sup> Curiously, however, an endorsee who had reimbursed a subsequent endorsee was entitled to bring an action in debt.<sup>164</sup> More puzzling still, an endorsee could not sue upon a promissory note payable to bearer, nor could the holder, but bills of exchange payable to order could be declared upon in special counts. “[N]otes of all kinds and bills payable to bearer were held not to be within the custom of Merchants.”<sup>165</sup>

This mystery culminated in Holt’s famous, or perhaps infamous, decision in *Buller v. Crips*.<sup>166</sup> *Buller* held that negotiability, in the sense that an endorsee was free to maintain an action on a bill payable to order despite prior defenses, was a special feature of true bills of exchange only, and not of simple obligatory notes.<sup>167</sup> Even notes payable to order were only treated as

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<sup>159</sup> See *infra* notes 498-511 and accompanying text.

<sup>160</sup> G. JACOB, *supra* note 21, under “Bill of Exchange.”

<sup>161</sup> See 8 W. HOLDSWORTH, *supra* note 21, at 164.

<sup>162</sup> G. JACOB, *supra* note 21, under “Bill of Exchange.”

<sup>163</sup> See *supra* note 433 and accompanying text.

<sup>164</sup> “[Y]et an indorsee who had reimbursed a subsequent indorsee might bring debt.” Beutel, *supra* note 69, at 839.

<sup>165</sup> *Id.*

<sup>166</sup> 87 Eng. Rep. 793 (K.B. 1704); see Cranch, *supra* note 21, at 78-79, 91-92.

<sup>167</sup> Beutel has gone so far as to assert that “[t]he only type of negotiable paper which received the approval of the common-law courts was the bill of exchange payable to order.” Beutel, *supra* note 69, at 839.



evidence in an action of *indebitatus assumpsit*.<sup>168</sup> This is particularly curious, since almost all of the policy and fairness issues present in true bills of exchange were to be found in both promissory notes payable to order and "inland" bills of exchange payable to bearer. Despite Holt's comment that he could "remember when actions upon inland bills did first begin,"<sup>169</sup> there is evidence of widespread use of such instruments in England well before Holt's lifetime.<sup>170</sup> The prompt passage of the Promissory Notes Act of 1704, the so-called "Act of Anne," which made all such obligatory instruments both fully assignable and negotiable, compounds the mystery.<sup>171</sup> Could this mean that despite the undeniable economic and policy pressures toward negotiability,<sup>172</sup> the common law could not respond with an acceptable, pragmatic doctrine? Was legislation the only solution?

There is one purported explanation for the strange, ad hoc development of English commercial law that will simply not suffice. That is the assertion that the economy of England was relatively undeveloped compared to other parts of Europe and, therefore, did not require the credit and transport advantages represented by mercantile instruments.<sup>173</sup> This is complete nonsense.<sup>174</sup> Credit and the use of bills of exchange were crucial to the extensive English wool trade throughout the late middle ages.<sup>175</sup> From 1429 to 1443, the English government attempted to force the staple merchants to carry bullion, rather than bills of exchange, back to England in the mistaken belief that this increased national wealth. The merchants vigorously and successfully resisted.<sup>176</sup> Postan has demonstrated that medieval English banking routinely included "the issue of letters of exchange payable in foreign ports to travellers overseas."<sup>177</sup> By the sixteenth century, the foreign trade of En-

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<sup>168</sup> *Id.* & n.132 and cases cited.

<sup>169</sup> 87 Eng. Rep. at 793.

<sup>170</sup> Cranch, *supra* note 21, at 78-79; 8 W. HOLDSWORTH, *supra* note 21, at 172; J. HOLDEN, *supra* note 21, at 80-84; *see infra* text accompanying notes 395-413 for a full discussion of Holt's opinions on this subject.

<sup>171</sup> *See* 8 W. HOLDSWORTH, *supra* note 21, at 172-73.

<sup>172</sup> This included the forcible loans by Charles of the bullion in the Tower and the infamous "Shutting of the Exchequer" in 1672. *See* Cranch, *supra* note 21, at 81-82.

<sup>173</sup> *See, e.g.,* 5 W. HOLDSWORTH, *supra* note 21, at 113 ("All through the Middle Ages, England was economically in a backward state of development.').

<sup>174</sup> *See* E. POWER, *THE WOOL TRADE IN ENGLISH MEDIAEVAL HISTORY* (1941); E. POWER, *The Wool Trade in the Fifteenth Century*, in *STUDIES IN ENGLISH TRADE IN THE FIFTEENTH CENTURY* (E. Power & M. Postan eds. 1933); C. FIFOOT, *supra* note 61, at 289; *see also* 1 E. LIPSON, *THE ECONOMIC HISTORY OF ENGLAND* 511-94 (12th ed. 1959).

<sup>175</sup> 1 E. LIPSON, *supra* note 174, at 548-50.

<sup>176</sup> *Id.* at 549-50 (describing one of these government attempts, the so-called Partition Ordinance of 1429).

<sup>177</sup> 1 E. LIPSON, *supra* note 174, at 616 n.1; *see* M. POSTAN, *PRIVATE FINANCIAL*

gland had stretched across the globe, and the need for, and reliance on, commerical instruments was common.<sup>178</sup> The widespread use of these bills to make returns and arrange loans, and possibly the ability to assign them by endorsement even without full negotiability, was vital to merchants,<sup>179</sup> and led to the founding of the first Royal Exchange by Sir Thomas Gresham in 1566.<sup>180</sup> Merchants, declared Gresham, "can no more be without exchanges . . . than ships at sea without water."<sup>181</sup>

Despite their relative prevalence, in early years both the mechanical operation and the economic effect of bills of exchange were profoundly misunderstood by many, including the traders. Writing in 1682, Scarlett observed that "to many, if not to most merchants . . . [exchange] remains a mystery, and is indeed the greatest and weightiest mystery that is to be found in the whole Map of Trade."<sup>182</sup> Even Malynes believed that bills of exchange were deliberately "undervalued" by foreign exchanges to draw "gold and silver out of the kingdom."<sup>183</sup> He urged a forced "par of exchange" as a sole remedy, thus displaying a profound misunderstanding of why exchange rates vary over time.

Common law jurists seemed equally perplexed by the "mystery" of exchange. Compared to the extensive treatment of bills of exchange in Benvenuto Stracca's *De Mercatura seu Mercatore tractatus*, first published in 1553, and Sigismundo Scaccis's *Tractatus de Commerciis et Cambio* of 1618, the English legal literature is strikingly primitive.<sup>184</sup> Prior to Malynes'

INSTRUMENTS IN MEDIEVAL ENGLAND, *VIERTELJAHRSSCHRIFT FÜR SOZIAL-UND WIRTSCHAFTSGESCHICHTE* XXIII (1930); see also SELECT PLEAS AND MEMORANDA, *supra* note 30, at xxxiii.

<sup>178</sup> See 2 E. LIPSON, *supra* note 174, at 184-96; 3 *id.* at 62-116, 232; see also *id.* at 80 ("In the sixteenth century England's foreign trade was conducted by means of bills of exchange . . ."). The proceeds of England's lucrative triangle trade, based on native woolens, Newfoundland fish, Portugese sugar, and Italian silk, returned to England "either in bills of exchange or in commodities." *Id.* at 96.

<sup>179</sup> Some have argued that there was "a thriving discount market, in which an assignee could have his bill cashed by a third party before it fell due." A. HARDING, *supra* note 23, at 319. This was probably a later development.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> 3 E. LIPSON, *supra* note 174, at 80. See generally J. SCARLETT, *THE STILE OF EXCHANGES* (London 1682) (Preface); J. MARIUS, *supra* note 35, at 1-5 (explaining the nature and uses of bills of exchange). According to Marius, "Exchange is by some held to be the most mysterious part of the Art of Merchandizing and Traffic." *Id.* at 5.

<sup>183</sup> See G. MALYNES, *THE MAINTENANCE OF FREE TRADE* 386-91 (London 1622); 3 E. LIPSON, *supra* note 468, at 81 n.5.

<sup>184</sup> See V. Piergiovanni, *Courts and Commercial Law at the Beginning of the Modern Age* 4-6 (unpublished manuscript, to appear in 2 *COMPARATIVE STUDIES IN CONTINENTAL AND ANGLO-AMERICAN LEGAL HISTORY* (V. Piergiovanni ed. 1987). See generally B. STRACCA, *supra* note 62; S. SCACCI, *supra* note 62.

treatise of 1622,<sup>185</sup> which was a layman's work, there were only a few published sample forms, including a form "Bill of Exchange" and a form entitled, "A protest for not accepting of a Bill of Exchange," both of which appeared in William West's revised *Symboleography* in 1615.<sup>186</sup> Indeed, the earliest serious English commercial writers were not lawyers at all. As John Marius, one of the most distinguished among them, put it, "The right dealing Merchant doth not care how little he hath to do in the Common Law, or things of that nature."<sup>187</sup>

The peculiar, ad hoc development of the English law of negotiable, mercantile instruments, as well as the seemingly isolated role of the true bill of exchange, is best explained by how the common law assumpsit remedy was first applied to bills of exchange and how it developed in the relative absence of a juristic literature or any major judicial explanation. It is here that Baker's research, which concentrated on a careful study of assumpsit declarations, made some challenging suggestions.<sup>188</sup> First, Baker revealed that the common law courts were enforcing the obligations represented by bills of exchange perhaps as early as 1520, considerably earlier than formal records and conventional historical accounts would suggest.<sup>189</sup> Although the records during this particular period rarely mention the bill of exchange, because of the "old ground that it was a matter of evidence rather than of obligation,"<sup>190</sup> explicit reference to subscribed paper *secundum usum mercatorum* can be found as early as 1540.<sup>191</sup> Baker observed that this period of enforcement was the result of the simultaneous expansion by the King's Bench of the use of assumpsit, which stretched the court's jurisdiction over a wide range of commercial transactions.<sup>192</sup>

Because assumpsit had no set formula, its forms could be adapted "to charge the various parties to bills of exchange," giving both the payee and drawer considerable flexibility in obtaining relief.<sup>193</sup> How did the common law regard these mercantile practices? It is in answer to this question that Baker makes his second major point:

<sup>185</sup> See G. MALYNES, *supra* note 26.

<sup>186</sup> W. WEST, *supra* note 33, at §§ 660-62. The "Instruments . . . concerning Merchants' Affairs" were not in the original edition, which appeared in 1590. For bibliographical information, see Coquillette, *supra* note 30, at 359 & n.234.

<sup>187</sup> J. MARIUS, *supra* note 35, at *To the Reader* (unpaginated). For a discussion of Marius's contribution, see Coquillette, *supra* note 30, at 359-60 & nn.237-38; Sutherland, *supra* note 20, at 162-67.

<sup>188</sup> See Baker, *supra* note 6.

<sup>189</sup> *Id.* at 308.

<sup>190</sup> *Id.* at 309.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 310. As Baker discovered:

The payee could sue the drawer on an undertaking by the drawer that the drawee would pay, or that if the drawee did not accept the bill the drawer would pay.

The law merchant was not even mentioned in the declarations. The King's Bench had merely removed the procedural barriers which had in the past prevented the two benches from enforcing such transactions in a direct way. This amounted, no doubt, to a substantial change in the common law. But it was part and parcel of the general development of *assumpsit* to enable the enforcement of all parol undertakings . . . . Apart from occasional use of the phrase *secundum usum mercatorum*, which falls far short of an averment of a custom, in none of the sixteenth-century cases so far discovered was there any attempt to lay the custom of merchants in the declaration. It is true that no one has yet made a thorough search of the King's Bench rolls between 1550 and 1600. But enough has come to light, both from random searches and from a study of books of entries, to show that the bill of exchange was received into the common law without express reliance on "law merchant."<sup>194</sup>

This incorporation without "express reliance" eventually created its own difficulties. Baker demonstrated that seventeenth-century mercantile declarations actually became more complex and specific, frequently setting out in full "the custom of merchants."<sup>195</sup> Baker's explanation for this development is convincing:

In later cases the plaintiff's allegation of custom was aimed at explaining the *assumpsit* rather than the consideration. Thus, in the first reported case, an action by the payee against the acceptor, the custom was inserted to emphasise that the act of accepting and subscribing a bill *secundum usum mercatorum* had the force of a promise. And a few years later, in an action against the drawer, the custom was put in to explain the liability of the drawer upon protest—the problem which had occasioned the special verdict in *Shepparde v. Becher*. The customs thereafter set out by plaintiffs are all to the effect that the defendant was bound or liable (*obligatus*) or chargeable (*onerabilis*) to pay the plaintiff, and in consideration of this liability or charge he promised to pay.<sup>196</sup>

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The payee could sue the acceptor on the basis that his acceptance amounted to an undertaking to pay. And the drawer could sue the drawee on an undertaking to accept and pay bills drawn on him.

*Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 313. For example, it was held in the 1669 case of *Brown v. London*, 86 Eng. Rep. 104 (K.B. 1669), that *indebitatus assumpsit* would not lie on an obligation "attributed to the custom of merchants, because it was not an indebtedness." Baker, *supra* note 6, at 314.

The plaintiff had either to bring *assumpsit* on the contract, and proffer the bill of exchange as evidence of a promise, or bring *onerabilis assumpsit* and set out the custom. The latter form never became exclusive of the former, and although we shall hereafter be chiefly concerned with the *onerabilis* form, it should be noticed

Baker's third critical point was that the "custom of merchants," set out in these declarations "was not . . . trade usage in the modern sense."<sup>197</sup> It was rather common law custom, "unchanging" and "unchangeable," delimited by the traditional requirements of "immemorial antiquity" and "a limitation of application, to distinguish it from the common law of the whole realm."<sup>198</sup> As Cowell stated, the law merchant was "a privilege or special lawe differing from the common lawe of England, and proper to merchants and summary in proceeding."<sup>199</sup>

But how was this custom to be limited? Was it "local," i.e., limited geographically, or was it to be "unlike all other customs allowed by the common law[,] . . . limited to a class of persons rather than a particular locality"?<sup>200</sup> Baker points out how difficult this issue was conceptually:

If it was truly a custom of England, then it was common law which would be noticed by the judges and needed no mention in pleading. If such a custom was alleged in pleading, it was to be treated as surplusage. It was therefore technically better to omit it altogether, but then the plaintiff had nothing on the record and had to be sure the judges and the jury would take notice of the principle on which he relied. The desire to formulate the custom on the record may explain the survival of the custom of the realm in *assumpsit* declarations. It was a particularly useful device in framing extensions of the law, as when it was alleged successfully in two cases of 1689 that the liability of the drawer extended to any persons (including non-merchants) who drew bills *secundum usum mercatorum* in favour of other persons; or when in 1693 it was established as the custom of England that the indorser is liable to a subsequent indorsee.<sup>201</sup>

Eventually, these problems were resolved by Hale, Holt, and Mansfield. As Hale wrote:

[E]ither the custom or law comes in question by special pleading, and then the court use to ascertain themselves by speech with merchants . . .

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that the survival of the first alternative precludes any argument that the setting out of the custom of merchants in *assumpsit* can by itself be equated with the reception of a "law merchant."

*Id.*

<sup>197</sup> *Id.* at 315.

<sup>198</sup> *Id.*

<sup>199</sup> See J. COWELL, *supra* note 33, under "Law Merchant." The first edition of THE INTERPRETER had a stormy history, and was officially suppressed. See Coquillette, *supra* note 68, at 71-87. As Baker points out, the Cowell definition was copied almost verbatim in a number of other later English dictionaries. Baker, *supra* note 6, at 316 n.80. Cf. G. JACOB, *supra* note 21, under "Law Merchant" (which defines "Law Merchant" as "a special Law differing from the Common Law of England, proper to Merchants, and become a Part of the Laws of the Realm").

<sup>200</sup> Baker, *supra* note 6, at 316.

<sup>201</sup> *Id.* at 317.

or else it comes in question upon the general issue, and then . . . merchants are usually jurors at the request of either party, and merchants are produced on either side to ascertain the court and jury touching the custom of merchants.<sup>202</sup>

By 1692, it was clear that the common law took "notice of the laws of merchants that are general, not those that are particular."<sup>203</sup>

But could mercantile customs bind non-merchants? By the Restoration, it became "usual to declare on the custom of one city (usually London) operating between the merchants resident in that and in some other named city."<sup>204</sup> Eventually it was held that any person in the named city who drew or accepted a bill of exchange "became a trader for the purpose of the custom."<sup>205</sup> And, as Baker pointed out, it is also likely that many plaintiffs "did bring general actions of *assumpsit* or *indebitatus assumpsit*, using the bill of exchange only as evidence at trial."<sup>206</sup>

Baker's research revealed, above all, that the common law treated mercantile customs "either [as] local facts or the common law of England."<sup>207</sup> As he explains, "In so far as the judges took notice of such customs or common law, they were not taking over for their own use a pre-existing body of jurisprudence."<sup>208</sup> It is not surprising, therefore, that "no reliance was placed in this period on learned treatises of the law merchant or of mercantile practice or of the laws of nature, and . . . no calls were made on the civil lawyers for their evidence or assistance."<sup>209</sup>

But did this not present a wonderful opportunity for civilian jurists? After all, bills of exchange were a product of international communication, at least in their classic "outland" form, and the common law doctrinal treatment

<sup>202</sup> M. Hale, *Treatise on the Admiralty Jurisdiction* (1675) (unpublished manuscript), quoted in Baker, *supra* note 6, at 318. Hale's treatise is currently being edited by D.E.C. Yale. Like Baker and many others, I am very grateful for Mr. Yale's generous assistance, which included supplying me with selections of the edited transcript, a truly collegial act. See *infra* notes 322, 343.

<sup>203</sup> *Id.* at 318 (quoting *Lethulier's Case*, 91 Eng. Rep. 384, 384 (K.B. 1692)).

<sup>204</sup> *Id.* at 319.

<sup>205</sup> *Id.* at 319; see also *id.* at 320 n.97 (providing a useful comparison of *Oaste v. Taylor*, 79 Eng. Rep. 262 (K.B. 1612) and *Witherley v. Sarsfield*, 90 Eng. Rep. 960 (K.B. 1689)). Baker correctly points out that *Witherley* does not represent a change in fundamental doctrine since *Oaste*. In *Oaste*, it was objected that "the defendant was not averred to have been a merchant at the time of acceptance." Baker, *supra* note 6, at 320 n.97. As Baker notes, in "the 1612 case [*Oaste*] the custom was only for merchants, whereas in the later cases [such as *Witherley*] it was 'for merchants and others.'" *Id.*

<sup>206</sup> *Id.* at 320.

<sup>207</sup> *Id.* at 321.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

was rugged at best. Perhaps they could have formed an alliance with the mercantile experts, such as Malynes and Marius, and drawn upon the rich continental heritage of Stracca and Scaccis. Was this not the way to establish the Admiralty as the jurisdiction of the future? Why should the law merchant suffer the conceptual indignities and vagaries of the common law forms of action and the doctrines of special custom, when it could possess its own jurisdiction, the Admiralty, and, through Doctors' Commons, its own jurisprudence? It was a crucial opportunity for the English civilian jurists.

C. *The English Civilian Approach to Bills of Exchange as a Matter of Doctrine*

Plucknett has stated that "the great Reception of Roman law . . . provided a scientific apparatus for the development of mercantile law."<sup>210</sup> Superficially, this is an attractive thesis. After all, the first bills of exchange came from the great Italian trading cities and were first systematically recognized and enforced in the Admiralty Court, which was populated by civilians and which consciously applied civil law.<sup>211</sup> The growing use of these bills did, after all, coincide with the cosmopolitanism of Sir Thomas Gresham's first Royal Exchange, established in 1566, the very year before the civilian citadel, Doctors' Commons, established itself practically next door in Mountjoy House.<sup>212</sup> And the sixteenth-century common law indisputably

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<sup>210</sup> T.F.T. PLUCKNETT, *supra* note 59, at 659. As Sutherland put it:

The first change was in the realm of theory. For Englishmen in the seventeenth and sixteenth centuries the Law Merchant was a theory, and a compilation of customs, which were both of foreign growth, though there had crept into them certain specifically English traditions. From the beginning of the century it is noticeable that English legal theorists, and civilians in particular, begin to lay a new stress on a theoretical systematisation of merchant customs, to give increasing attention to the Merchant Law or Custom, as something known and existent outside the Common Law.

Sutherland, *supra* note 20, at 157.

<sup>211</sup> See 1 SELECT PLEAS, *supra* note 62, at lxxx.

<sup>212</sup> See A. HARDING, *supra* note 23, at 319. The English exchange system developed slowly; the first London exchange was founded in only 1566 by Sir Thomas Gresham, a civilian admirer and founder of Gresham College, which was a center of cosmopolitan studies in London. As Sutherland observed:

The other cause of the failure of the English Law Merchant to develop, was that English economic conditions separated sharply the trader and merchant proper, as the distinction was recognised by the end of the sixteenth century. The merchant was to the English essentially the exporter, with his organised markets abroad. For this reason an English centre of exchange was slow to develop, and when it did was only a small offshoot of the great exchange markets abroad. Seventy years after the founding of the Royal Exchange, Lewes Roberts in his *Merchants' Mappe of Commerce* points out that 'The Exchanges practised in England, and principally in London, are confined within a narrow scantling, being but as a Rivolet issuing out of the great streame of those Exchanges that are used beyond the Seas.'

Sutherland, *supra* note 20, at 156.

failed to accommodate bills of exchange through general rules of law or to explicitly reconcile such bills with any common law principles.<sup>213</sup>

Regrettably, as we have seen, the sixteenth-century English Admiralty records paid far more attention to the practical enforcement of actual mercantile practices than to the task of providing any legal rationale or "scientific apparatus" for these practices, be it civilian or otherwise.<sup>214</sup> But what about the jurists of Doctors' Commons? Could they do better?

Bills of exchange, as such, were not known to classical Roman law, despite desperate attempts by some antiquarians to find them there.<sup>215</sup> At best, the Romans had only crude written money orders.<sup>216</sup> It was the extensive commercial development in Italy in the twelfth and thirteenth centuries that first brought bills of exchange to the attention of Bartolist commentators and some information about them can be found in civilian sources during this and later periods. But bills of exchange presented as many theoretical problems to civilian jurists as to common lawyers. For example, let us look at Strahan's *Domat*<sup>217</sup> and Ayliffe's *New Pandect*,<sup>218</sup> which contain entire sections devoted to bills of exchange.

To begin with, civilians, and particularly Domat, were great classifiers, and a bill of exchange was simply hard to classify. It was not a sale, for, as Domat pointed out, "nobody sells or buys in it."<sup>219</sup> Nor was it an "exchange" in the classical sense, since "he who gives his Money takes nothing in counter-change, and does not give one Thing, that he may receive another of a different kind; since he who received the Money may restore the same Individual Species which he received."<sup>220</sup> It was not a "*depositum*," since "he who received the Money remains answerable for it, altho' it be lost by unforeseen Accident."<sup>221</sup> It was also not a "loan," as "he who receives the Money does not borrow it."<sup>222</sup> What about a "letting and hiring"? Certainly not, for that would mean that "he who receives the Money did nothing else but barely carry it to the place whither it ought to be remitted, having a

<sup>213</sup> See *supra* notes 129-87 and accompanying text.

<sup>214</sup> See *supra* notes 99-126 and accompanying text.

<sup>215</sup> See, e.g., Thayer, *supra* note 27, at 147 (claiming that "commercial paper payable to bearer and to order dates at least from the days of Athens"); see also 2 C. SHERMAN, *ROMAN LAW IN THE MODERN WORLD* 360-61 (1937). For a better view, see sources cited *supra* notes 216, 252. I am indebted to Charles Donahue, Jr., for pointing out that Ihering made a similar, and equally unsuccessful, effort to find commercial doctrines in Roman sources.

<sup>216</sup> See F. SANBORN, *supra* note 21, at 18-19. As Joseph Story observed, "As a branch of practical jurisprudence, or as a circulating medium in trade, Bills of Exchange were unknown to the Romans." J. STORY, *supra* note 21, at 8.

<sup>217</sup> W. STRAHAN, *supra* note 25.

<sup>218</sup> J. AYLIFFE, *supra* note 4.

<sup>219</sup> W. STRAHAN, *supra* note 25, at 231.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*



certain Allowance for carrying it . . . without answering for Accidents.''<sup>223</sup> But, as Domat observed, "when he who receives the Money engages himself by a Bill of Exchange to remit it to another place; the Money remains in his hands, at his peril, and is no longer the Money of the person who gave it.''<sup>224</sup>

It therefore had to be a "covenant"; but it certainly was "different from all the other[] [covenants].''<sup>225</sup>

The Covenant that passes between the person who has received the Money, whether Banker or other person, and him to whom he gives Order to pay it in another place, is a Partnership, if they are Partners and Correspondents with one another: Or is it a Procuration, or Commission, if the Correspondent be only the Factor or Agent of the person who has received the Money. Thus, this Covenant hath its Rules, which have been explained in the Title of Partnership, and in that of Proxies, or Letters of Attorney.<sup>226</sup>

From a civilian perspective there were two critical "covenant" relationships involved in a bill transaction. The first involved the relationship between the person who paid the money and needed the bill, the remitter, and he who drew the bill, the drawer. The second was the one between the drawer and the payee. Neither covenant relationship was easy for civilian doctrine to describe. Was the first an "assignment" or a "procuration"? Domat took a stab at the puzzle:

The Covenant between the person who has paid the Money, and him, to whom he gives his Order to receive it, is either an Assignment, if he substitutes him in his place, and transfers his Right to him; or it is a Procuration, if he gives him barely the power to receive the Money for his use. Thus, this Covenant hath its Rules in the Title of the Contract of Sale, where mention hath been made of Transfers and Assignments; or in that of Proxies.

There is lastly another Covenant, which passes between him who paid down the Money, and the person who is ordered to answer the Bill of Exchange, when he accepts the Bill. And this Covenant is the same with that which passed between him who paid in the Money, and him who received it; for it only adds the Obligation of him who accepts the Bill, to that of the person who drew it: and it obliges the person who accepts the Bill to pay it on the day, and in the place specified in the Bill.<sup>227</sup>

Domat candidly concluded that bills of exchange were governed by rules that were not universal, but "proper and peculiar to Bills of Exchange."<sup>228</sup>

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<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 231-32.

<sup>228</sup> *Id.* at 232.

*Si certo loco traditurum se quis stipulatus sit, hac actione utendum erit. l. 7.*

Even more candidly, he directed the reader to the "Ordinance of 1673, under the title of Bills of Exchange."<sup>229</sup> Domat still maintained, however, that the fundamental principles were Roman.<sup>230</sup>

Yet the bill of exchange was no more treated as an independent source of legal obligation under civilian doctrine than it was at common law. It was evidence of underlying covenants, just as it was evidence under the common law of the underlying assumpsit.<sup>231</sup> But unlike the common law, under civilian doctrine there was no need to allege the custom of merchants and thereby tangle with the awkward common law "custom" requirements of immemorial antiquity and limited application. The civilians had looser requirements, as well as the adaptable theory of *ius gentium*.<sup>232</sup> They also had the practical assistance of the Ordinances of Louis XIV.<sup>233</sup>

Ayliffe's analysis is another good example of this civilian treatment. As with Domat, Ayliffe encountered serious classification problems. A bill of exchange was not really a *permutation*, an exchange, say, of a horse for a garment, nor was it a *mutuum*, or loan, particularly if it was genuine and not merely a front for a usurious loan.<sup>234</sup> A *cambium*, or money exchange, was selected as the most suitable category. But *cambium* was a medieval beast,

§ i. ff. de eo quod cert. loc. Is qui certo loco dare promittit, nullo alio loco, quam in quo promisit, solvere invito stipulatore protest. l. 9 eod. v. l. i. C. ubi conv. qui cert. loc. d. p.

<sup>229</sup> *Id.* See *infra* note 448.

<sup>230</sup> *Id.* at n.a. (footnotes are lettered).

<sup>231</sup> Baker, *supra* note 6, at 310.

<sup>232</sup> See Coquillette, *supra* note 68, at 22-34.

<sup>233</sup> See *infra* note 448. For an insightful review of the relationship of customary commercial law, the Roman law as *ius commune* on the continent, and the enacted commercial codes, see V. Piergiovanni, *supra* note 184, at 14-16; Coing, *The Roman Law as Ius Commune on the Continent*, 89 LAW Q. REV. 505, 514-17 (1973).

<sup>234</sup> J. AYLIFFE, *supra* note 4, at 502. According to Ayliffe:

That I call *real* Exchange, whereby one *Species* of Money is *really* and *truly* exchanged for another. But *dry* Exchange is not a *true*, but a *feigned* Exchange, and is a Loan or *Mutuum* under the Shew and Image of *real* Exchange, As it happens, when the *Campsor* delivers Money to the *Campsarius* to be paid in the same Place where delivered, by signed Letters of Bills, to a distant Place, to which Place these Bills are not really sent; or if they are sent, they have no more Operation or Effect than if they were not sent, because the *Campsor* knows the *Campsarius* to have no Money there where the Bills are sent, either *actually* or *potentially*; and, therefore, is nothing else but downright Usury. . . . 'Tis called *dry* Exchange according to *Navarrus*; because it wants Moisture, or a just Title of receiving any Gain thereby: Money being stiled *Saliva Mecurialis* by the Poets, and others.

*Id.* Note that Ayliffe uses the term *Campsor* for drawer: "derived from *Cambium*, we mean him who pays or delivers out Money by Bills for *Exchange*; and by the word *Campsarius*, him who receives the Money by way of *Exchange*: that is to say, the *Drawer* and *Presenter*." *Id.*

not a Roman one,<sup>235</sup> and its meaning, as Ayliffe recognized, was never clear: "Sometimes all kind of *Permutation* is comprehended under the Name of *Exchange*, called *Cambium*."<sup>236</sup> But Ayliffe used it more narrowly, confining its definition to "that kind of contract, whereby Money is exchanged or barter'd for Money in order to distinguish it from *Permutation* properly so called."<sup>237</sup> A *cambium*, he observed, was begat of the *ius gentium*:

This way of remitting Money by Bills was invented and introduced by the Law of Nations for many wise Reasons, *viz.* not only for the sake of keeping the *Species* within the Territory of every State, but likewise to prevent Robberies, and to ease People in carrying Money from one Place to another, which might prove an Inconvenience. Trade is greatly promoted by a *local* Exchange; and therefore every prudent State encourages the same under certain Restrictions. *Local* Exchange is not only lawful, if it be made to Places at a great distance, but even though it be made to Places of the same Kingdom or Province, if such Exchange be not specially prohibited. But the greater the Distance is, the greater is the Stipend or Course of Exchange, generally speaking, though the Bankers of the present Age do not much regard the distance of Places, but are chiefly governed herein by Trade.<sup>238</sup>

Ayliffe nevertheless set out three critical rules of exchange as if they were in the civil law. The first rule established that bills of exchange were negotiable, but the drawer was the one ultimately liable, unless the drawee accepted.<sup>239</sup> This Ayliffe loosely ascribed to Digest 14.6.16.<sup>240</sup> Ayliffe's second rule posited that bills of exchange could be accepted for "honor," creating an action between he who accepts and the drawer.<sup>241</sup> This Ayliffe ascribed,

<sup>235</sup> See *id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.* at 504.

<sup>239</sup> According to Ayliffe:

Bills of Exchange are Proof against the Writer, not only in favour of him to whom they are directed, but also in favour of a third Person: But they are not proof against him to whom they are directed; nor do they produce any Obligation, unless they are accepted: for if the Person accepts of them, he remains obliged. If Bills of Exchange are given out, they cannot be recalled, before that is paid for which they were drawn.

*Id.* at 505.

<sup>240</sup> *Id.* at n.e. (footnotes are lettered).

<sup>241</sup> As Ayliffe explained:

According to the Style and Custom among Merchants, any third Person may pay Bills of Exchange in honour of the Writer of such Bills, and by paying them, he acquires an Action against the Drawer, and has the Writer bound to him: And he unto whom such Bills are directed, may do the same, *viz.* by accepting of them upon a Protest, saying, *I will not accept of this Order or Commission, but in honour of the Writer. I am ready to pay such Bill, and will have the Writer bound to me.* Because though the Bill be directed to a Person, who does not accept of it; yet this does not take away the power of paying it upon a Protest. I

even more loosely, to Digest 3.5.39.<sup>242</sup> Finally, Ayliffe adopted the three important doctrines of 1) "speedy notice" on protest, 2) interest for dishonor, and 3) the ten day rule for sight payment.<sup>243</sup> Even Ayliffe did not have the courage to cite the Digest for this! It was "according to the Custom of the Place, and the Course of the Exchange," or "the style and Custom among Merchants."<sup>244</sup>

Other civilian writers did not even attempt to fit bills of exchange into a classical structure. Thomas Wood pointed out that in the classical exchange, or "*permutation*," one could not "discern who is the Seller or the Buyer, or what is the Price, and which Merchandize . . . is bought or sold."<sup>245</sup> With bills of exchange, however, "there are *three* Persons which may be distinguished[:] he that . . . remit[s] his Money, he that receives it . . . and he that undertakes to deliver it at the Place . . . and there may be a Fourth Person, viz. he to whom the Order is assign'd."<sup>246</sup> Wood added, "I mention this Contract under *Permutation* or Exchange, because it hath the same Name, but it hath nothing of its *Nature*."<sup>247</sup> Thus, according to Wood, the relationship between the drawer and drawee of a bill of exchange could be described as a "*Partnership* or Society," and "he to whom the Order is given seems to act also by *Commission* and Authority."<sup>248</sup> More to the point, Wood, like Domat, ultimately relied on a statutory recognition, directing the reader to "3 & 4 Ann. c. 9 Concerning Bills of Exchange."<sup>249</sup> Earlier civilians, such as Wiseman and Cowell, also did not attempt an analysis of the theoretical or

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say, a third Person that pays Bills of Exchange not directed to him, or drawn on him, acquires an Action: For he who pays Money for another, discharges that other Person, and he shall have an Action *for Business done* against him, because the Debtor is so bound to him. And 'tis the same thing by a Parity of Reason, in respect of him who pays them with a Protest, though directed to him.

*Id.*; see *supra* notes 41, 141.

<sup>242</sup> *Id.* at n.g. (footnotes are lettered).

<sup>243</sup> *Id.* at 505.

<sup>244</sup> *Id.* Ayliffe stated:

A protest made at the time of accepting of Bills of Exchange, ought, according to the Style and Custom among Merchants, to be repeated at the time of Payment, otherwise the *Acceptor* shall be said to have accepted the said Bills *freely*, and without Reserve. The Writer of Bills of Exchange that are returned with a Protest, is obliged to the Payment of the Sum or Sums contained therein with Interest, and they are Evidence for the Benefit of him, at whose Instance they were made or drawn. The time for paying Bills of Exchange is ten Days more or less, according to the Custom of the Place, and the Course of the Exchange.

*Id.*

<sup>245</sup> T. WOOD, A NEW INSTITUTE 239 (2d ed. London 1712).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 240 (misnumbered 242 in original text)

<sup>249</sup> *Id.*

statutory origins.<sup>250</sup> Cowell, in his famous *The Institutes of the Lawes of England*, simply observed:

Obligations by our Law arise from implied Contracts many wayes . . . as for the transacting of businesse, and the like: (a) that which is done by the command, or for the sake of one that is absent [if Lawyers have informed mee aright,] is rather left to the conscience and integrity of him whose businesse it is, then to any Action to be satisfied."<sup>251</sup>

The only conclusion is that the civilian jurists had no better doctrines than the common lawyers to accommodate bills of exchange. The bills simply did not fit into the *Corpus Juris* any better than they fit into the *Register of Writs*. Both the civilians and the common lawyers were desperately trying to keep up with the realities of the market place. The civilian doctrine of customary *ius gentium* was, however, less demanding than the common law doctrine of custom. Moreover, the initially felt need to quarantine bills of exchange from the common law of the whole realm was, in the case of English civilian practice, neatly provided for by the jurisdictional parameters of the Admiralty. The irony was that the civilians, who had endeavored to expand these jurisdictional walls, had no desire to see them abolished altogether. These walls may have limited the civilian practice, but they also defended the cozy civilian monopoly. Regrettably, English civilian jurisprudence also reflected the same limited perspective in doctrinal matters. The civilians thus failed to capture the jurisprudence of the law merchant, and lost the key to the future.

### III. SOME PECULIAR DEBTS AND DEBTORS

*Nothing could, in fact, be more tempting, and nothing more dangerous, than to treat the Bill of Exchange as the counterpart of the old Roman literal contract.*<sup>252</sup>

Edward Jenks

It is dangerous to use the acceptance or rejection of specific doctrines as a touchstone to test the influence of the English civilians.<sup>253</sup> One may be seduced into "finding" direct doctrinal links which did not, in fact, exist, or

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<sup>250</sup> See J. COWELL, *supra* note 33, under "Exchange" (*excambium, vel cambium*); see also J. COWELL, *THE INSTITUTES OF THE LAWES OF ENGLAND* 182-87, 203 (London 1651); *supra* note 199.

<sup>251</sup> J. COWELL, *supra* note 250, at 203.

<sup>252</sup> Jenks, *The Early History of Negotiable Instruments*, in 3 *SELECT ESSAYS*, *supra* note 21, at 70.

<sup>253</sup> See Coquillette, *supra* note 68, at 87-89; Coquillette, *supra* note 30, at 317-20, 346-71; see also Wieacker, *The Importance of Roman Law for Western Civilization and Western Legal Thought*, 4 *B.C. INT'L & COMP. L. REV.* 257, 280 (1981) ("The utility of Roman law . . . is not restricted to its direct effects on the content of modern legal systems.").

which were insignificant when compared to other evolutionary forces, such as mercantile practices. Alternatively, one may conclude, out of despair, that the civilians, after three hundred years of law practice and institutional existence in the heart of London, left little behind in the living fabric of the law. These twin pitfalls were identified by Richard Helmholz in his brilliant Selden Society lecture.<sup>254</sup> Helmholz pointed out that "legal history is winner's history, and at the end of the day the ecclesiastical courts were losers [and]. . . Doctors' Commons is gone,"<sup>255</sup> but that, nevertheless, the importance of what he called "reciprocal influence" should not be ignored.<sup>256</sup>

Helmholz restricted his analysis to canon law doctrines, focusing particularly on defamation and bankruptcy.<sup>257</sup> Although he rejected the position that common lawyers were merely "receptacles for an alien and sophisticated system of law," Helmholz concluded "that the canon law, as enforced in the Church Courts, was one of the sources from which English lawyers could and did willingly draw ideas."<sup>258</sup> I regret that I do not have the opportunity here to do the badly needed examination of the canon law. Nevertheless, my thesis is that Helmholz's perspective of civil law as a source of ideas for English lawyers is particularly fruitful in examining the contribution of later secular English civilian jurisprudence, and gives a fair picture of its lasting influence. It can also shed light on the so-called "incorporation" of the law merchant into common law.

I will test this thesis by examining the jurisprudence of two great and acknowledged common law "incorporators," Sir John Holt and Lord Mansfield. While I will continue to focus on bills of exchange and commercial law, I will also examine some of their opinions in other areas that are particularly revealing of their juristic method.

I also must make another important point: although the English civilian jurists came from a narrow, self-defined professional monopoly, civilian jurisprudence was a vast system of ideas with an accessible literature. English civilian jurists attempted to gain influence by promoting or extolling this vast system in an English context. This point can be illustrated by examples of civilian influence on certain early common law jurists, namely Francis Bacon, John Selden, and Matthew Hale, and a similar influence on Thomas Hobbes. While this early influence had nothing to do with the law merchant, its history assists in understanding exactly how civilian method-

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<sup>254</sup> See Selden Society Lecture by R.H. Helmholz, Professor of Law, The University of Chicago (July 5, 1982), in R. HELMHOLZ, *CANON LAW AND ENGLISH COMMON LAW* 3-4 (1983).

<sup>255</sup> *Id.* at 3.

<sup>256</sup> *Id.* at 4.

<sup>257</sup> *Id.* at 9-11.

<sup>258</sup> *Id.* at 17. Helmholz acknowledged the work of Franz Wieacker, who made similar claims for the influence of Roman law in the development of Western legal thought generally. *Id.* at 17 n.35; see Wieacker, *supra* note 253, at 257-81.

ology influenced those common lawyers who *did* establish modern English commercial law, such as Holt and Mansfield.

A. *Some Early Examples of Civilian Influence on Common Law Jurisprudence: Bacon, Hobbes, Selden, and Hale*

1. Francis Bacon

Francis Bacon (1561-1626) would have fervently denied being a civilian, if only as a matter of simple political expediency. Coke would have gladly seized any opportunity to tar his rival with the brush of "foreign ideas," "absolutism," and Catholicism.<sup>259</sup> Bacon held fast to the common law citadels of Westminster Hall and Gray's Inn, and kept away from civilian Great Knight Rider Street. Still, Bacon's writing and his attitude toward legal authority were strongly influenced by civilian ideas.<sup>260</sup>

These civilian elements in Bacon's work, especially his theoretical jurisprudence and his proposals for the scientific reform of the sources of English law, influenced other common lawyers. Bacon's proposals for reform were inspired by Justinian's compilers and by the civilian codification ideals promoted in England by John Cowell and other contemporary civilians.<sup>261</sup>

<sup>259</sup> See, e.g., Coquillette, *supra* note 68, at 84-86.

<sup>260</sup> See generally *id.* at 37-87 (for a discussion of the contemporary civilians).

<sup>261</sup> Wheeler, *The Invention of Modern Empiricism: Juridical Foundations of Francis Bacon's Philosophy of Science*, 76 LAW LIB. J. 78, 115 (1983). Bacon promoted these civilian codification theories in various treatises. See F. BACON, *Example of a Treatise on Universal Justice or the Fountains of Equity, by Aphorisms: one Title of it*, in 5 THE WORKS OF FRANCIS BACON 88-110 (J. Spedding, R. Ellis, & D. Heath, eds. new ed. 1877) [hereinafter WORKS]; F. BACON, *A Proposition . . . touching the Compiling and Amendment of the Laws of England*, in 13 WORKS, *supra*, at 61-71 (J. Spedding, R. Ellis, & D. Heath, eds. new ed. 1872); F. BACON, *A Memorial Touching the Review of Penal Laws and the Amendment of the Common Law*, in 12 WORKS, *supra*, at 84-86 (J. Spedding, R. Ellis, & D. Heath, eds. new ed. 1869); see also Coquillette, *supra* note 68, at 9 n.16 (observing that Bacon is "[t]he most overlooked example of the civilian influence" and providing numerous references to his treatises and his civilian endeavors).

Harvey Wheeler's brilliant recent work on Bacon as a social scientist has corrected a multitude of misconceptions about Bacon. Wheeler's work suggests that the significance of Bacon's contributions can best be appreciated by seeing it for what it was: the cornerstone of modern social science and empiricist jurisprudence as written by a statesman, rather than the cornerstone of "hard science" or modern scientific doctrine. Wheeler, *supra*, at 78. Bacon, in fact, had made a similar observation:

All who have written concerning laws have written either as philosophers or lawyers. The philosophers lay down many precepts fair in argument, but not applicable to use: the lawyers, being subject and addicted to the positive rules either of the laws of their own country or else of the Roman or Pontifical, have no freedom of opinion, but as it were talk in bonds. But surely the consideration of this properly belongs to statesmen, who best understand the condition of civil

The core of Bacon's proposed reform included the codification of all the laws, reports, and decisions of English law, "culling out all that was archaic, irrelevant, inapplicable, and redundant, [and] preserving only those laws, forms, and procedures representative of current juridical and social realities."<sup>262</sup> These would then be organized into "institutes," which "like the *Institutes* of Justinian would become the basis for the teaching of a new empirico-deductive common law to facilitate adjudication."<sup>263</sup>

Apart from the obvious debt of this scheme to the civilian tradition, Bacon owed a more fundamental juristic debt to contemporary civilian legal studies. As Harvey Wheeler has observed, "Bacon leavened the rigid inductivism of Coke's antiquarian empiricism with an imperative deductivism born of his [Bacon's] Roman law and equity jurisdiction practice."<sup>264</sup> This, Wheeler believed, "together with his [Bacon's] parallel interest in science, gave all his legal writings a rationalist quality that startles us with its modernity."<sup>265</sup> Indeed, Bacon's best professional works, particularly *The Maxims of the Law*,<sup>266</sup> *The Reading on the Statute of Uses*,<sup>267</sup> *The Ordinances in Chancery*,<sup>268</sup> and *A Preparation Toward the Union of Laws*,<sup>269</sup> indicate that he anticipated two important, modern jurisprudential schools: analytical positivism and instrumentalism.<sup>270</sup> His anticipation of the former is reflected

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society, welfare of the people, natural equity, customs of nations, and different forms of government; and who may therefore determine laws by the rules and principles both of natural equity and policy. Wherefore let it be my present object to go to the fountains of justice and public expediency, and endeavour with reference to the several provinces of law to exhibit a character and idea of justice, in general comparison with which the laws of particular states and kingdoms may be tested and amended. I will now therefore according to my custom set forth an example thereof in one of its heads.

F. BACON, *De Augmentis*, in 5 WORKS, *supra*, at 88.

<sup>262</sup> Wheeler, *supra* note 261, at 115.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 105.

<sup>265</sup> *Id.*

<sup>266</sup> F. BACON, *The Maxims of the Law*, in 7 WORKS, *supra* note 261, at 327-93 (J. Spedding, R. Ellis, & D. Heath eds. new ed. 1879).

<sup>267</sup> F. BACON, *The Learned Reading of Mr. Francis Bacon . . . Upon the Statute of Uses*, in 7 WORKS, *supra* note 261, at 395-450.

<sup>268</sup> F. BACON, *Ordinances . . . For the Better and More Regular Administration of Justice in the Chancery*, in 7 WORKS, *supra* note 261, at 759-74. Parts of the *Ordinances* were incorporated by Bacon from other sources. See Heath, *General Preface to the Professional Works*, in 7 WORKS, *supra* note 261, at 304.

<sup>269</sup> F. BACON, *A Preparation Toward the Union of Laws*, in 7 WORKS, *supra* note 261, at 731-43.

<sup>270</sup> As to the nature of analytical positivism and instrumentalism, see Hurst, *The Unfinished Work of the Instrumentalists*, 82 MICH. L. REV. 852 (1984) (reviewing R. SUMMER, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982)). For a new appreciation of Bacon's early legal writing, see Hogan & Schwartz, *On Bacon's 'Rules and Maxims' of the Common Law*, 76 LAW LIB. J. 48 (1983). See generally



in his legal writings, which focused "on the logical implication of concepts regarded as giving authoritative form to a system of law." The tenets of the latter were evident in his attempts to measure the success of legal rules by their utility in light of social and political reality, including their efficacy in reaching particular economic or commercial goals.

Bacon's jurisprudence was also progressive. He "proclaimed the inevitable enlargement of human knowledge and the resulting improvement of the human lot."<sup>271</sup> This optimism allowed Bacon to believe not only in the need for legal theory, but in its utility as well. As Holdsworth has observed, "Bacon was one of the earliest common lawyers to appreciate the need for some kind of general jurisprudence; and . . . he was certainly the earliest to show . . . how it might be used to improve an existing body of law."<sup>272</sup> This progressive hope captured the spirit of Justinian's compilers and the spirit of the civilian humanists.

Bacon's rationalism and progressive temper were greatly influenced by prior and contemporary English civilians, such as Thomas Smith, Alberico Gentili, William Fulbecke, and John Cowell.<sup>273</sup> Bacon himself acknowledged their importance:

[A]lthough I am a professor of the common law, yet am I so much a lover of truth and of learning, and of my native country, that I do heartily persuade that the professors of law, called civilians, because the civil law is their guide, should not be discountenanced or discouraged: else whensoever we shall have aught to do with any foreign king or state, we shall be at a miserable loss, for want of learned men in that profession.<sup>274</sup>

It is also clear that Bacon himself influenced later English civilians. For example, the title of Robert Wiseman's famous civilian treatise, *The Law of Laws*,<sup>275</sup> was probably inspired by Bacon's definition of the *legum leges* in *Book VIII of De Augmentis*, as "certain 'laws of laws,' whereby we may derive information as to the good or ill set down and determined in every law."<sup>276</sup>

B. SHAPIRO, *PROBABILITY AND CERTAINTY IN 17TH CENTURY ENGLAND* (1984); C. WHITNEY, *FRANCIS BACON AND MODERNITY* (1986).

<sup>271</sup> D. BOORSTIN, *THE DISCOVERERS* 645 (1983).

<sup>272</sup> 5 HOLDSWORTH, *supra* note 21, at 250.

<sup>273</sup> For a discussion of these civilians, see Coquillette, *supra* note 68, at 49-86.

<sup>274</sup> Letter From Francis Bacon to George Villiers, Duke of Buckingham (1666), reprinted in 6 J. SPEDDING, *THE LETTERS AND LIFE OF FRANCIS BACON* 27, 39 (1872).

<sup>275</sup> R. WISEMAN, *THE LAW OF LAWES: OR, THE EXCELLENCY OF THE CIVIL LAW, ABOVE ALL OTHER HUMANE LAWS WHATSOEVER: SHEWING OF HOW GREAT USE AND NECESSITY THE CIVIL LAW IS TO THIS NATION* (London 1656; London 1664; London 1686) (citations are to the 1686 printing).

<sup>276</sup> F. BACON, *Aphorism 6, De Augmentis*, in 5 *WORKS*, *supra* note 261, at 89; see

## 2. Thomas Hobbes and John Selden

If Bacon would have objected to being characterized as a civilian, the reaction of his famous acquaintance, Thomas Hobbes (1588-1679),<sup>277</sup> and Hobbes's equally famous friend, John Selden (1584-1654), would have been positively violent.<sup>278</sup> But Bacon's civilian debts were shared by Hobbes and Selden.<sup>279</sup> Hobbes revealed his civilian bent in his famous, *A Dialogue Between A Philosopher and a Student of the Common Laws of England*, published in 1681.<sup>280</sup> "There the lawyer . . . defends Coke's exegetical common law method of extrapolating the law solely from the narrowly conceived case precedents."<sup>281</sup> The philosopher [Hobbes] "counters with the argument that the law of reason, as expressed in equity and Roman law jurisdictions (for example, the Admiralty court) is 'far superior.'"<sup>282</sup>

Hobbes's friend Selden, although an avid opponent of direct reception, was deeply learned in civilian texts and theory.<sup>283</sup> His understanding of the dynamic nature of legal history, which has rightly earned him the place of honor as our first scientific legal historian, owed more to the historical studies of the civilian "humanist" school of Coquille, Cujas, Hotman, and Bude, than to the gothic inquiries of Coke.<sup>284</sup>

Selden's most important statement concerning general jurisprudence was

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also Bacon, *Preface to the Maxims of the Law*, in 7 WORKS, *supra* note 261, at 320 ("And therefore the conclusions of reason of this kind are worthily and aptly called by a great civilian *legum leges*; for that many *placita legum*, that is, particular and positive learnings of laws, do easily decline from a good temper of justice, if they be not rectified and governed by such rules."); Wheeler, *supra* note 261, at 109.

<sup>277</sup> According to Aubrey, Hobbes was Bacon's secretary in approximately 1625 and actually took dictation from Bacon. 1 DICTIONARY OF NATIONAL BIOGRAPHY 979 (comp. ed. 1975) [hereinafter DNB]. Aubrey further commented that Hobbes "show[ed], as may be believed, more intelligence than other amanuenses, and helped in turning some of the essays into Latin." *Id.*

<sup>278</sup> Selden, in particular, resisted what he took to be civilian pretensions to a monopoly on learning, but this, as with Coke, did not stop him from using civilian sources and having an excellent knowledge of the civilian literature. See Coquillette, *supra* note 68, at 84-87.

<sup>279</sup> 1 DNB, *supra* note 277, at 979.

<sup>280</sup> See *A Dialogue between a Philosopher and a Student of the Common Laws of England*, in 6 THE ENGLISH WORKS OF THOMAS HOBBS 1-160 (London 1890) (1st. ed. 1681), reprinted in T. HOBBS, *DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAWS OF ENGLAND* (J. Cropley ed. 1971).

<sup>281</sup> *Id.* at 110.

<sup>282</sup> *Id.*

<sup>283</sup> 2 DNB, *supra* note 277, at 1885-86; see J. SELDEN, *HISTORY OF TYTHES* (London 1618) [hereinafter TYTHES] and J. SELDEN, *TITLES OF HONOUR* (London 1614) [hereinafter HONOUR] (on civilian specialties).

<sup>284</sup> See Coquillette, *supra* note 68, at 34 n.131; 5 W. HOLDSWORTH, *supra* note 21, at 407-12.

his *Ad Fletam Dissertatio*, originally printed in 1647 as an explanatory introduction to the first printed edition of *Fleta*.<sup>285</sup> Denying that there was a reception of Roman law in England, Selden believed that after the Roman occupation had ended, "the inhabitants, restored to their own jurisdiction, either rejected the imperial law or so neglected it that it soon disappeared."<sup>286</sup> Later medieval civil law influence was "received," according to Selden, only sparingly, and in limited circumstances:

[W]herever a principle or analogy was required for interpreting old or new laws, or where a tradition or express enactment was lacking, recourse might be had to it as the best and richest repository of jurisprudence and because, by deduction or analogy, it might conveniently supply a rule in matters hitherto undecided.<sup>287</sup>

Selden shared Bacon's appreciation of the deductive and comparative importance of civil law sources, just as he shared Hobbes's appreciation of the rationalist methodologies and historical sense of the new humanism of the *mos gallicus*. The importance of these civilian elements in Selden's writing, evident in his edition of Fortescue's *De Laudibus Legum Angliae*,<sup>288</sup> his *History of Tythes*,<sup>289</sup> his *Mare Clausum*,<sup>290</sup> and his *Ad Fletam Dissertatio*, has been widely overlooked.<sup>291</sup> Selden is partly to blame for this oversight. His systematic repudiation of any significant, direct doctrinal reception in *Ad Fletam Dissertatio*, combined with his flat assertion that no common law rule had ever been actually displaced by the introduction of a civil law doctrine, has given him a reputation as a chauvinist.<sup>292</sup> But Selden was

<sup>285</sup> See I. SELDINI, *AD FLETAM DISSERTATIO* (D. Ogg ed. 1925) [hereinafter J. SELDEN]; E. FLETCHER, *JOHN SELDEN 1584-1564*, at 15 (London 1969).

<sup>286</sup> J. SELDEN, *supra* note 285, at 45; see also Ziskind, *John Selden: Criticism and Affirmation of the Common Law Tradition*, 19 AM. J. LEGAL HIST. 22 (1975) (for a general discussion of Selden's contributions as England's first legal historian and the Roman law influence on his writings).

<sup>287</sup> J. SELDEN, *supra* note 285, at 97.

<sup>288</sup> J. FORTESCUE, *DI LAUDIBUS LEGUM ANGLIAE* (London 1737).

<sup>289</sup> TYTHES, *supra* note 283.

<sup>290</sup> J. SELDEN, *MARE CLAUSUM SUE DE DOMINIO MARIS LIBRI DUO . . .* (London 1665).

<sup>291</sup> From his later comments in *AD FLETAM DISSERTATIO*, it appears that Selden's study of Fortescue's *DE LAUDIBUS LEGUM ANGLIAE* may have been provoked, at least in part, by Fortescue's "remarkable statement" that "some English kings, not satisfied with native laws, attempted to introduce the civil laws into the government and repudiate English laws." J. SELDEN, *supra* note 285, at 171; see J. FORTESCUE *supra* note 288, at ch. xxxiii. Selden concluded that there was no evidence for this statement. J. SELDEN, *supra* note 285, at 171. For a good modern edition of this work by Fortescue, see J. FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* 79 (S. Chrimes ed. 1942).

<sup>292</sup> See Ziskind, *supra* note 286, at 39. Selden was also a bit sensitive to criticism from civilians, and reportedly took the infamous prank play, *Ignoramus*, as an attack

actually saying little more than what Baker asserts today. English law did not acquire foreign elements wholesale, although change from many sources did, in fact, "percolate up" from within the system.<sup>293</sup> Selden himself was a prime example of such "percolating." This included his civilian methodology and insights deduced from civilian sources.<sup>294</sup> He also did not overlook the English civilian practitioners. As he said in his famous *Table Talk*:

If I would study ye Canon Law as t'is used in England; I must study ye heads herein use; Then goe to ye practisers in those Corts where ye Law is practysed; and know their Customes. Soe f[or] all study in ye world.''<sup>295</sup>

Selden opposed the importation of a civilian system in the manner proposed in the *Dialogue between Starkey and Pole*.<sup>296</sup> Nor did he even address the proposals of contemporary English civilians, such as Wiseman, for specific reception of civil law rules. This was true even though Wiseman's proposal was only to occur with the consent of the common lawyers, and then only to correct defects in the English law, and then only "where there is greatest need of equity and a good conscience."<sup>297</sup> If asked whether Admiralty practices, derived in part from civil law principles and in part from mercantile practice, constituted a "reception" of civil law, Selden, like

on himself. See Ogg, *Introduction* to J. SELDEN, *supra* note 285, at xlviii; see also Coquillette, *supra* note 68, at 82 n.434 (discussing the origins of the play, *Ignoramus*, and the stir it created).

<sup>293</sup> See Baker, *supra* note 6, at 298.

<sup>294</sup> As Ziskind points out, Selden "denied that the principles of natural law could be deduced wholly from the civil law of Rome, nor could a case be made for the universality of Roman law throughout history, a theory put forth by Gentili in *De Jure Belli*, Book 1, Chapter III." Ziskind, *supra* note 286, at 37. But this is quite consistent with recognizing a more limited influence. HONOUR, *supra* note 283, at preface (unpaginated); J. SELDEN, *TABLE TALK OF JOHN SELDEN* 24 (F. Pollock ed. 1927) (1st ed. 1689) [hereinafter *TABLE TALK*] (concerning study of canon law).

<sup>295</sup> *TABLE TALK*, *supra* note 294, at 24.

<sup>296</sup> See Ogg, *Introduction* to J. SELDEN, *supra* note 285, at xlvii. According to Pole:

There is no doubt but that our law and order thereof is over-confused. It is infinite and without order or end. There is no stable ground nor sure stay; but everyone that can colour reason maketh a stop to the best law that is beforetime devised. The subtlety of one sergeant shall evert and destroy all the judgments of many wise men beforetime received. There is no stable ground in our common law to lean unto . . . . The statutes of kings also be overmany, even as the constitutions of the emperors were. Wherefor I would wish that all these laws should be brought into some small number and to be written also in our mother tongue, or else put into Latin.

*Id.* at xlvii.

<sup>297</sup> *Id.* at lxii; R. WISEMAN, *supra* note 274, at 17.

Baker today, would simply assert that it was all really an indigenous development.<sup>298</sup>

But Selden appreciated the importance of civil law as a source of ideas, whether through canon law,<sup>299</sup> university legal studies,<sup>300</sup> diplomatic and international practices, or commercial law.<sup>301</sup> While Selden could find no "clear distinction between the exponents of civil law and of English law" in secular legal treatises,<sup>302</sup> he illustrated on several occasions "the authority of the imperial law and its function in providing the principle (or what was thought to be the principle) by which a decision was come to."<sup>303</sup> He also understood the importance of the "consultative capacity" of civilians and canonists in matters of foreign or ecclesiastical law, although he did not mention commercial specialties.<sup>304</sup>

Selden's most conspicuous civilian debt was in the area of comparative and international law, as illustrated by his *Titles of Honor* and his *de Jure Naturali et Gentium*,<sup>305</sup> and particularly by his famous *Mare Clausum*.<sup>306</sup> His inductive, utilitarian approach to international problems was explicitly influenced by the English civilians Alberico Gentili, Gentili's disciple William Fulbecke, Sir Thomas Ridley, and Richard Zouche.<sup>307</sup> In *de Jure Naturali et Gentium*, Selden compared ancient Hebrew law with Roman law and with the history of the actual relations among nation states. His conclusion, that there is both a "primitive" or "natural" law of nations, and a "secondary" law which arises from compacts and usages, was similar to observations of both Gentili and Bacon. It also had clear ramifications for international usages of trade and for the customs of war and peace. Selden would deny that any of this involved a "reception" of foreign doctrine in the

<sup>298</sup> Ogg, *Introduction* to J. SELDEN, *supra* note 285, at lxiii; *see supra* text accompanying notes 8-16.

<sup>299</sup> J. SELDEN, *supra* note 285, at 139.

<sup>300</sup> *Id.* at 141.

<sup>301</sup> *Id.* at 163.

<sup>302</sup> *Id.* at 141.

<sup>303</sup> *Id.* at 149-51.

<sup>304</sup> *Id.* at 163-65.

<sup>305</sup> J. SELDEN, *supra* note 290; *see* A. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 93 (1947). Civilians were active in the High Court of Chivalry, which adjoined Doctors' Commons, and titles, heraldry, and precedence were no small part of seventeenth century foreign affairs. *See* G. SQUIBB, *THE HIGH COURT OF CHIVALRY: A STUDY OF THE CIVIL LAW IN ENGLAND* 29-67, 81-117 (1959).

<sup>306</sup> *See supra* note 290.

<sup>307</sup> *See* Coquillette, *supra* note 68, at 54-70; Coquillette, *supra* note 30, at 336-46; W. BUTLER, *INTERNATIONAL LAW AND THE COMPARATIVE METHOD IN INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE* 25 (W. Butler ed. 1981); H. WHEATON, *HISTORY OF THE LAW OF NATIONS* 100-04 (New York 1845); *see also* E. FLETCHER, *supra* note 285, at 12 ("If the *Mare Liberum* [Grotius] was the inspired harbinger of the future, the *Mare Clausum* was the faithful mirror of the actual . . .").

political sense, which was true, but the process he described would ultimately provide much inspiration to Holt and Mansfield.<sup>308</sup>

As with Bacon, Selden's contact with the civilians was always a two-way street. Not only was he influenced by the ideas and methodology of the early English civilians, he himself was avidly read by later civilians.<sup>309</sup> The Restoration civilians frequently addressed Selden's arguments and attempted to shore up their own assertions by reference to his work.<sup>310</sup>

Selden was also the link between Bacon and Matthew Hale. When Bacon was appointed as Lord Keeper, Selden presented him with his monograph, *A Brief Discourse Touching the Office of the Lord Chancellor of England*, which appeared in 1617.<sup>311</sup> Bacon, in turn, respected Selden's expertise and in 1621 sought his legal advice, probably as to the legality of certain "passages of Parliament" relevant to Bacon's personal plight at the time, although this is not absolutely clear from Selden's surviving letter to Bacon.<sup>312</sup> At least one version of Bacon's will asked that Selden be consulted by Bacon's literary executor as to what "to publish or surpress,"<sup>313</sup> and Bacon certainly gave Selden some books.<sup>314</sup> In turn, Matthew Hale was Selden's literary executor, and Selden dedicated his famous *Table Talk* to Hale.<sup>315</sup> It was rumored that Hobbes was at Selden's death bed, much to the dismay of Hale, who regarded Hobbes as of suspect piety.<sup>316</sup> Thus Selden's life linked all these key figures.

### 3. Matthew Hale

Matthew Hale (1609-1676) was critically important to the development of English jurisprudence. He was, as J. H. Baker observed, "the greatest common lawyer since Coke, and his work was based on a first-hand knowledge of the sources, allied to great ability to develop a scientific arrangement with legal principles."<sup>317</sup> There can be no doubt that he read and appreciated

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<sup>308</sup> Selden's primary aversion to civil law was its political identification with continental absolutism. J. SELDEN, *supra* note 285, at 165. It was political subjugation and absolutism he feared, not civilian methodology and humanism. See Ziskind, *supra* note 286, at 39; Ogg, *Introduction* to J. SELDEN, *supra* note 285, at lxvi.

<sup>309</sup> See J. AIKIN, *THE LIVES OF JOHN SELDEN, ESQ. AND ARCHBISHOP USHER* 195-96 (London 1812); H. ROSCOE, *LIVES OF EMINENT BRITISH LAWYERS* 45 (London 1830).

<sup>310</sup> See Coquillette, *supra* note 1, at 305, 312-13, 316, 320, 337.

<sup>311</sup> 2 DNB, *supra* note 277, at 1885-86.

<sup>312</sup> Letter from Francis Bacon to John Selden (Feb. 14, 1621), *reprinted in* 14 J. SPEDDING, *supra* note 274, at 332-33.

<sup>313</sup> *Id.* at 540; see Hogan & Schwartz, *supra* note 270, at 54 n.32, 55 n.36.

<sup>314</sup> J. MYRES, *THE BODLEIAN LIBRARY IN THE SEVENTEENTH CENTURY* 43-44 (1951).

<sup>315</sup> 2 DNB, *supra* note 277, at 1885-86.

<sup>316</sup> *Id.* at 1886. As to Hale's early acquaintance with Selden, see 1 *id.* at 866.

<sup>317</sup> SELDEN SOCIETY, *SIR MATTHEW HALE 1609-1676, CATALOGUE OF AN EXHI-*

both Bacon and Selden, and was, like them, a student of Roman law.<sup>318</sup> Nor can it be disputed that his "association with the school of historical jurists of whom Selden was the chief, made him with the exception of Francis Bacon the most scientific jurist that England had yet seen."<sup>319</sup> In his *History of the Common Law*,<sup>320</sup> published in 1713, Hale asserted his belief in a scientific, rational, and instrumentalist jurisprudence.<sup>321</sup> He was also prominent during the critical civilian struggle for the Admiralty.<sup>322</sup>

Like Bacon, Hobbes, and Selden, Hale would certainly not have identified himself with the English civilians. He was a stalwart common lawyer,<sup>323</sup> and actually attacked the civilians directly in his famous *Preface to Rolle's Abridgement*,<sup>324</sup> published in 1668. It was not that he identified with Hobbes either, whom he regarded as being a totalitarian and of doubtful piety. Indeed, one of his most interesting juristic pieces was a sharp attack on Hobbes's *Dialogue*, entitled "Reflections by the Lrd. Cheife Justice Hale on Mr. Hobbes his Dialogue of the Lawe."<sup>325</sup> Although deeply religious, Hale debated Hobbes "on his [Hobbes's] own ground," asserting that "law should be tested by reason."<sup>326</sup> But Hale's test of reason was distinctly instrumentalist:

BITION 1 (1976). For Hale's life, see G. BURNET, *LIFE AND DEATH OF SIR MATTHEW HALE* (London 1682); 7 E. FOSS, *THE JUDGES OF ENGLAND* 105-16 (London 1864); E. HEWARD, *MATTHEW HALE* (1972); *THE AUTOBIOGRAPHY OF THE HON. ROGER NORTH* 94-103 (A. Jessopp ed. 1887); H. ROSCOE, *supra* note 309, at 59-83; J. WILLIAMS, *MEMOIRS OF THE LIFE, CHARACTER AND WRITING OF SIR MATTHEW HALE* (1835); Holdsworth, *Sir Matthew Hale*, 39 *LAW Q. REV.* 402 (1923).

<sup>318</sup> See 5 W. HOLDSWORTH, *supra* 303, at 483; 6 *id.* at 574-75.

<sup>319</sup> 6 W. HOLDSWORTH, *supra* note 21, at 581; see also E. HEWARD, *supra* note 317, at 178.

<sup>320</sup> M. HALE, *HISTORY OF THE COMMON LAW* (London 1713).

<sup>321</sup> See Wheeler, *supra* note 261, at 111; Shapiro, *Law and Science in 17th Century England*, 21 *STAN. L. REV.* 727, 729 (1969).

<sup>322</sup> D.E.C. YALE, *HALE AS A LEGAL HISTORIAN* 9-10 & n.19 (London 1976) [hereinafter *HALE AS LEGAL HISTORIAN*]; Yale, *A View of the Admiral Jurisdiction: Sir Matthew Hale and the Civilians*, in *LEGAL HISTORY STUDIES* 1972, at 87-109 (D. Jenkins ed.) [hereinafter *Admiral Jurisdiction*]; Yale, *Introduction to M. HALE, THE PREROGATIVES OF THE KING ix-lviii* (Selden Soc'y Pub. No. 92, 1979) [hereinafter *PREROGATIVES*]. Eagerly awaited is M. Hale, *Treatise on the Admiralty Jurisdiction* (D.E.C. Yale ed.) (unpublished manuscript). See *supra* note 202.

<sup>323</sup> Hale, *Preface Directed to the Young Students of the Common-Law* to H. ROLLE, *UN ABRIDGEMENT DES PLUSIEURS CASES ET RESOLUTIONS DEL COMMON LEY* (6th page, unpaginated) (London 1668); see J. COWLEY, *A BIBLIOGRAPHY OF ABRIDGEMENTS . . . TO THE YEAR 1800*, at 77-78 (1932).

<sup>324</sup> Hale, *supra* note 323.

<sup>325</sup> 5 W. HOLDSWORTH, *supra* note 21, at 500-13.

<sup>326</sup> *Id.* at 482; see also E. HEWARD, *supra* note 317, at 26-27.

[W]e must remember, that lawes were not made for their own sakes, but for the sake of those who were to be guided by them; and though it is true that they are and ought to be sacred, yet, if they be or are become unusefull for their end, they must either be amended, if it may be, or new lawes be substituted. . . .<sup>327</sup>

Hale was a systematizer and a moderate, yet optimistic, advocate of scientific reform. He also "seems to have grasped the idea of comparative legal history, and in so doing moved away decisively from the introspective and insular intellectual tradition of the Common Law."<sup>328</sup> Yale suggested that Hale got this emphasis from Selden, which was certainly true, but Hale, like Selden, was influenced by the comparative work of the civilian humanists as well.<sup>329</sup> He certainly "does appear to have borrowed the basic framework [of his *General Analysis*] from the Roman Law."<sup>330</sup>

Further, while "Hale had a great admiration for Roman law academically considered; his attitude to its contribution in practical, jurisdictional terms was much less cordial."<sup>331</sup> In his unpublished *Jurisdiction of the Admiralty*, Hale insisted that "the rules of the civil law ought not to be applied to the common law, nor to be cited to perplex the proceedings therof."<sup>332</sup> Hale was no more accommodating to the civilian lawyers themselves; during the 1652 debate over the probate jurisdiction, Hale accused the civilian practitioners of demanding "what is unreasonable, to have civil [law] compulsory more than common law."<sup>333</sup>

Hale explained his resistance to civil law doctrine in his anonymous

<sup>327</sup> Hale, *Considerations touching the Amendment or Alteration of Lawes*, in F. HARGRAVE, *A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND FROM MANUSCRIPTS 269* (Dublin 1787)). According to Hale,

He, that thinks a state can be exactly steered by the same laws in every kind, as it was two or three hundred years since, may as well imagine, that the cloth that fitted him when a child should serve him when he was grown a man. The matter changeth the custom; the contracts the commerce; . . . . As manufactures, mercantile arts, architecture, and building, and philosophy itself, receive new advantages and discoveries by time and experience, so much more do lawes, which concern the manner and customes of men.

*Id.* at 269-70.

<sup>328</sup> HALE AS LEGAL HISTORIAN, *supra* note 322, at 7.

<sup>329</sup> See Coquillette, *supra* note 68, at 35-70.

<sup>330</sup> HALE AS LEGAL HISTORIAN, *supra* note 322, at 8. The *General Analysis* was appended to M. HALE, *supra* note 320; see also M. HALE, *THE ANALYSIS OF THE LAW* (LONDON 1713) (reprinted in facsimile, 1978); G. BURNETT, *supra* note 317, at 192.

<sup>331</sup> HALE AS LEGAL HISTORIAN, *supra* note 322, at 10.

<sup>332</sup> *Id.* at 17 n.20 (There are two manuscripts: B. Hargrave MS 93 and MS 137) (available in the British Museum).

<sup>333</sup> *Id.* at 17 n.20; see Cotterell, *Interregnum Law Reform: the Hale Commission of 1652*, 83 ENG. HIST. REV. 685, 689 (1968).



*Preface to Rolle's Abridgement*, a short piece "directed to the young students of the common-law."<sup>334</sup> First, Hale distrusted any "Modells of Laws," and any analytical theorist, be he Bodin or Hobbes, who advocated them.<sup>335</sup> He preferred incremental legal development, forged and refined by the test of utility, and this he saw represented in the evolving common law.<sup>336</sup> Second, he distrusted the motives and experience of the civilian practitioners. The civilians, he observed, "though otherwise of good parts and possibly well acquainted with University learning, pretend two great prejudices and exceptions against the study of the Common Law."<sup>337</sup> The first, according to Hale, was "[t]hat it [the common law] wants clear evidence of reason, and that the conclusions and resolutions of it are not deducible by such evident rational consequence as is or may be done in other sciences."<sup>338</sup> The second was "[t]hat it [the common law] wants method, order, and apt distributions."<sup>339</sup>

These "prejudices" were, in Hale's view, based on the civilians' failure to recognize that, although "reason is the common faculty and instrument of mankind," the common law consisted of rules borne of "great Wisdom, Experience, and Time."<sup>340</sup> Such rules were needed "to settle that variety and inconstancy of particular Applications and Conclusions, which without some established rule would be found in most men, though of excellent parts and reason, and agreeing in Common Notions."<sup>341</sup> Responding to the civilians' complaint about the common law's order and method, Hale insisted that although "it is true that all the particulars . . . are not easily reducible into a Scholastick method, . . . they recompence that Inconvenience by their particularity and useful Application to particular Occasions."<sup>342</sup> In short, Hale believed that what the common law lacked in superficial theoretical elegance, it more than compensated for in its practical development, which was constantly being tested by utility and concrete application. Civilians who failed to perceive this were, to Hale's thinking, either caught up in academic fantasies or had their own hidden political agenda.

Hale's unpublished manuscript on Admiralty jurisdiction<sup>343</sup> was written

<sup>334</sup> Hale, *supra* note 323 (1st page, unpaginated).

<sup>335</sup> *Id.* (3d page).

<sup>336</sup> *Id.* (3d and 4th pages).

<sup>337</sup> *Id.* (6th page).

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* (7th page).

<sup>341</sup> *Id.*

<sup>342</sup> *Id.*

<sup>343</sup> See *supra* notes 202, 322. I am most grateful to D.E.C. Yale for kindly providing me with sections of the edited manuscript. See also *Admiral Jurisdiction*, *supra* note 322, at 87, 102. His labor, together with that of M. J. Prichard, have this important manuscript ready for publication.

about 1675 at a critical time for the civilians.<sup>344</sup> It indicated that Hale's reservations about civilian conceptions extended to the Admiralty as well. Due to its private nature, and because of Hale's temperate disposition, it did not have the polemical tone of some of the debates at the time. It was, one might say, a balanced document, and it acknowledged the usefulness of civil law jurisprudence in specific areas: "That law is best," wrote Hale, in one of the manuscript's more colorful passages, "that is best for the people whose law it is, as the shell of an oyster is better for an oyster than the shell of a periwinkle or scallop, although this look finer and be fitter for that fish whose shell it is."<sup>345</sup>

Hale did not emphasize the inadequacies of the Admiralty, but exalted the capacity of the common law courts to resolve matters typically reserved to the Admiralty.<sup>346</sup> He did not, for example, object to applying foreign law "or indeed general maritime law," including bottomry, where it was appropriate in a common law context, and he was willing to use "foreign," rather than local, juries where "justice and convenience" required it.<sup>347</sup> Hale's optimism caused him to overlook a series of difficulties with the common law in such cases, and it was from this "unconscious bias" that he belittled some practical advantages of the Admiralty process.<sup>348</sup> But these forgivable oversights do not detract from Hale's generally expansive, pragmatic, and cosmopolitan attitude toward the development of the law.<sup>349</sup>

There is irony in all of this. Yale has correctly stated that, because the civilians failed to achieve legislative relief, the jurisdictional battle was fought between lawyers.<sup>350</sup> The common lawyers had the edge in numbers, professional strength, and doctrinal weapons, which were backed by the writ of prohibition.<sup>351</sup> The losers, according to Yale, were the litigants, who lost the advantages of useful Admiralty doctrines and process, as well as the specialist expertise of the civilian practitioners.<sup>352</sup> But surely Hale's jurisprudence had already pointed to the ultimate means for consolidating the common law "conquest": testing the validity of doctrines and procedures by their ultimate usefulness to English society. This is what would ultimately lead to progressive common law reform. Was the ultimate legacy of the early English civilian jurists to provide the most able common lawyers with the

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<sup>344</sup> *Id.* at 102.

<sup>345</sup> *Id.* (quoting from the unpublished manuscript, B. Hargrave MS 93, *supra* note 332); *see also id.* at 109 n.45.

<sup>346</sup> *Id.* at 104-05.

<sup>347</sup> *Id.* at 105.

<sup>348</sup> *Id.* at 105-08.

<sup>349</sup> In this, Hale owed no small debt to Selden. *See infra* text accompanying notes 283-310.

<sup>350</sup> *Admiral Jurisdiction*, *supra* note 322, at 108.

<sup>351</sup> *Id.*

<sup>352</sup> *Id.* at 103-08.

very juristic insights and tools by which the ultimate conquest of the civilians' beloved Doctors' Commons would be achieved?

B. *Debtors of a Different Stripe: Sir John Holt (1642-1710) and William Murray, Lord Mansfield (1705-1793)*

The jurisprudence of Holt and Mansfield presents an entirely different kind of problem from that posed by the jurisprudence of Bacon or Hale. Neither Holt nor Mansfield ever published a legal institute or treatise.<sup>353</sup> Bacon wrote incessantly on abstract juristic issues, as did Selden and Hobbes. Hale was also a prolific essayist, although much of his work was left incomplete. But when his legal writings were published, they were spectacularly successful.<sup>354</sup>

<sup>353</sup> For an excellent analysis of Mansfield's recently discovered trial notebooks, which were found in an attic in Scone Palace in 1967, see E. HEWARD, *supra* note 317, at 57-59. Professor James C. Oldham is currently editing selected cases from these trial notebooks, which were kept by Mansfield of jury trials he conducted during his tenure on King's Bench. Professor Oldham is working from a complete micro-film copy of the 56 surviving notebooks provided by the generosity of the current (eighth) Earl of Mansfield. I am grateful to Professor Oldham for freely sharing the insights he has gained in this most important study. See Oldham, *The Origins of the Special Jury*, 50 U. CHI. L. REV. 137, 140 n.13 (1983).

Insights into Mansfield's intelligence, wit, and broad interests can be gleaned from his speeches and surviving correspondence. See, e.g., Speech of the Right Hon. Lord Mansfield in the House of Lords, in the Cause between the City of London and Dissenters, *reprinted in* AN INTERESTING APPENDIX TO SIR WILLIAM BLACKSTONE'S COMMENTARIES 142-55 (Phil. 1773); 1 DNB, *supra* note 277, at 1452 and sources cited; E. HEWARD, LORD MANSFIELD 182 (1979) (collecting sources); LETTERS FROM ANDREW STUART, ESQ. TO THE RIGHT HONOURABLE LORD MANSFIELD (London 1773). Professor Oldham has also pointed out to me that Mansfield was a major influence on W.D. Evans' (1767-1821) translation and revision of Pothier's famous treatise on obligations. See 13 W. HOLDSWORTH, *supra* note 21, at 466-67; see M. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS AND CONTRACTS (W. Evans trans. London 1806).

<sup>354</sup> See 1 DNB, *supra* note 277, at 866 ("He gave express direction that nothing of his own composition should be published except what he had destined for publication in his lifetime, an injunction which has been by no means rigorously obeyed."). For examples of recent new editions of Hale's work, all of which was published unfinished and posthumously, see M. HALE, *supra* note 320 (C. Gray ed. 1971); PREROGATIVES, *supra* note 322. The works Hale clearly intended for publication were not on legal subjects. See, e.g., M. HALE, AN ESSAY TOUCHING THE GRAVITATION OR NON-GRAVITATION OF FLUID BODIES, AND THE REASONS THEREOF (London 1673). But see Hale, *supra* note 323 (although anonymous, it was intended for publication); E. HEWARD, *supra* note 317, at 183 & n.597. For a full list of early published works and unpublished manuscripts, see 1 DNB, *supra* note 277, at 866-67; G. BURNETT, *supra* note 317, at 90-93.

By contrast, Holt and Mansfield left only reported decisions,<sup>355</sup> which are inherently ad hoc, fragmented, and retroactive: a poor medium for developing a coherent jurisprudence. Reported decisions were also vulnerable to the distortions of private reporters, which was a source of great consternation to Holt.<sup>356</sup>

Of course, the medium of responsible, reported decisions was also unavailable to Bacon and Hale. There were no *Lord Randolph's Reports* or *Burrow's Reports* in their day.<sup>357</sup> But Bacon was not compelled to write his *Maxims* or Hale his *History of the Pleas of the Crown* and his *History of the Common Law* by the absence of accurate reporters; rather, they possessed a systematizing, compiling spirit, a spirit that would have found the walls of a stated case confining and the reporting of one's ideas in another's words a severe and inhibiting imposition.

Developing notions of legal authority account for part of this difference. Bacon believed that a legal principle stood alone; its inherent rationality and fairness was its ultimate test. Citing a past case was hardly adequate to support a principle.<sup>358</sup> He also rejected the notion that the judge, acting as a lawmaker within the confines of the stated case, speaks with enhanced authority. Judges, admonished Bacon, "ought to remember that their office *Ius dicere*, and not *Ius dare*."<sup>359</sup> Hale's fear of a priori systems of legal reasoning gave him more respect for the test of historical usage, although this was less a theory of precedent than it was a belief that repeated use often reflected merit.<sup>360</sup>

<sup>355</sup> See 1 DNB, *supra* note 277, at 1452 (Mansfield); *id.* at 993 (Holt). For Holt's only published effort, see J. HOLT, A REPORT OF DIVERS CASES IN THE PLEAS OF THE CROWN ADJUDGED AND DETERMINED IN THE REIGN OF THE LATE KING CHARLES II (collected by Sir John Kelyng, Knt. London 1708). For Mansfield's published efforts, see *supra* note 353.

<sup>356</sup> See J. WALLACE, THE REPORTERS 393 (1882). It was, perhaps, for this reason that Holt's only literary endeavor was editing part of J. Kelyng's Reports. *Id.* at 626-28.

<sup>357</sup> *Id.* at 446-52 (Burrow), 401-07 (Raymond). Mansfield was even doubtful about Lord Raymond. See *id.* at 401.

<sup>358</sup> See F. BACON, *Of Judicature*, in 6 WORKS, *supra* note 261, at 506-10; F. BACON, *De Augmentis*, in 5 WORKS, *supra* note 261, at 88-109.

<sup>359</sup> F. BACON, *Of Judicature*, in 6 WORKS, *supra* note 261, at 506. For a discussion of the use of precedent in equity, see Winder, *Precedent in Equity*, 57 LAW Q. REV. 245, 246 (1941).

<sup>360</sup> The modern theory of precedent was still undeveloped in Hale's time. See R. CROSS, PRECEDENT IN ENGLISH LAW 19-32 (2nd. ed. 1968). In Hale's words:

It is true, the Decisions of Courts of Justice, tho' by Virtue of the Laws of this Realm they do bind, as a Law Between the Parties thereto, as to the particular Case in Question, 'till revers'd by Error or Attaint, yet they do not make a Law properly so called, (for that only the King and Parliament can do); yet they have a great Weight and Authority in Expounding Declaring, and Publishing, what the

The absence of a formal system of precedent justice may have encouraged powerful judges, such as Holt and Mansfield, to use the reporters as a medium for their legal ideas. As Mansfield said, "as useages of society alter, the law must adapt itself to the various situations of mankind."<sup>361</sup> Confined, as they were, by the strictures of case-by-case decisionmaking, Holt and Mansfield might seem far removed from the civilian jurist tradition of the universities and Doctors' Commons.<sup>362</sup> The task of resolving stated cases was very different from the discipline of codification, treatise writing, compiling maxims and institutes, organizing university courses, and defending principles of jurisdiction or doctrine through a systematic use of legal history and comparative law techniques. This difference in format inevitably led to

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Law of this Kingdom is, especially when such Decisions hold a Consonancy and Congruity with Resolutions and Decisions of former Times; and tho' such Decisions are less than a Law, yet they are a greater Evidence thereof than the Opinion of any private Persons, as such, whatsoever.

M. HALE, *supra* note 320, at 45 (C. Gray ed. 1971).

Of course, these juristic attitudes cannot be isolated from the historical development of the doctrine of *stare decisis* and *ratio decidendi*. The earliest arguable distinction between *ratio decidendi* and *obiter dictum* was contained in a case decided in about 1633, well toward the end of Hale's judicial career. R. CROSS, *supra* note 360, at 37; see T.F.T. PLUCKNETT, *supra* note 59, at 349; 1 W. BLACKSTONE, COMMENTARIES \*69-72 (Oxford 1765); Re, *Stare Decisis and the Judicial Process*, 22 CATH. LAW. 38, 40-41 (1976); Winder, *supra* note 359, at 246-79. In fact, "it is to the nineteenth century that we must look for the final stages of the present system." T.F.T. PLUCKNETT, *supra* note 59, at 350. The "tendency" toward precedent in Chancery dated to approximately the same period. Winder, *supra* note 359, at 245.

It was not too long before Hale's time that Coke had argued that "two or three precedents" of modern vintage could not prevail against older authority. *Slade's Case*, 76 Eng. Rep. 1072, 1074 (K.B. 1602); see 6 W. HOLDSWORTH, *supra* note 21, at 414; see also J. BAKER, *supra* note 24, at 171-75. In theory, this restrained judges from introducing binding new ideas through judicial decision—a point that was not lost on Commonwealth radicals such as John Warr. See J. WARR, THE CORRUPTION AND DEFICIENCY OF THE LAWS OF ENGLAND (London 1649), noted in 6 W. HOLDSWORTH, *supra* note 21, at 414. One could, perhaps, trace the practice of critically discussing earlier cases to Fitzherbert, and of reporting cases with "most firmness and surety of law" to Plowden. *Id.* at 173; see E. PLOWDEN, THE COMMENTARIES OR REPORTS iii-vi (London 1761) (1st ed. London 1571). But "the doctrine of the binding force of precedent did not appear for another three centuries or more." J. BAKER, *supra* note 24, at 173.

<sup>361</sup> *Johnson v. Spiller*, 99 Eng. Rep. 702, 703 (K.B. 1784), quoted in J. BAKER, *supra* note 24, at 174 n.18.

<sup>362</sup> As to whether Holt believed that some matters should more appropriately be resolved by the legislature, see *infra* text accompanying notes 409-19. As to the history of English legal treatises as sources of authority, see Simpson, *The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature*, 48 U. CHI. L. REV. 632-68 (1981).

differences in substance. In this sense, the "pure" heirs of the seventeenth-century civilian jurists were Jeremy Bentham and Joseph Story, not Holt or Mansfield.<sup>363</sup> On the other hand, Holt and Mansfield learned one lesson well, Hale's lesson of effective, pragmatic use of legal ideas from many sources. This was to have a direct effect on the development of commercial law. Let us begin with Holt.

### 1. John Holt

John Holt (1642-1710), as with so many great English jurists, lacks a scholarly biographer.<sup>364</sup> He was said to have a really fearsome wife, who supposedly promoted Holt's career by keeping him hiding in terror at his office all his life, but we actually know little about his personal life.<sup>365</sup> Much more is known about his political tightrope walking during the "Troubles," which earned him the respect of both factions.<sup>366</sup> But studying Holt's jurisprudence requires the ultimate sacrifice of scholars: full immersion into the shifting swamp of late seventeenth-century reporters. Holt had warned of their shortcomings, and he feared that the "skimblescamble stuff" which they published would "make Posterity think ill of his understanding, and that of his brethren on the bench."<sup>367</sup> All made some mistakes, and a few simply did not understand what they were reporting.<sup>368</sup> But if we are to test Holdsworth's sweeping generality that "Holt was the first judge to appreciate the modern conditions of trade, and the importance of moulding the doctrines of the common law to fit them,"<sup>369</sup> then into the swamp we must go.

Holt's opinions, as found in the likes of Salkeld and Lord Raymond's *Reports*, certainly reflect the importance of Holt's idea of custom. In a dozen cases, Holt emphasized the difference between pleading on a bill of exchange in assumpsit and pleading on a local custom.<sup>370</sup> Holt thus reaffirmed the fundamental common law principle that pleading generally in assumpsit

<sup>363</sup> See *infra* note 562.

<sup>364</sup> See 2 J. CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND* 118-78 (London 1849); 1 DNB, *supra* note 277, at 993; 7 E. FOSS, *supra* note 317, at 386-95; 6 W. HOLDSWORTH, *supra* note 21, at 516-18; W. HOLDSWORTH, *SOME MAKERS OF ENGLISH LAW* 153-60 (1st ed. 1938).

<sup>365</sup> See 1 DNB, *supra* note 277, at 993.

<sup>366</sup> 2 J. CAMPBELL, *supra* note 364, at 124-31; 1 DNB, *supra* note 277, at 993; 7 E. FOSS, *supra* note 317, at 388-89.

<sup>367</sup> See 2 J. CAMPBELL, *supra* note 364, at 136-37. Holt was particularly critical of a series called *The Modern Reports*. See J. WALLACE, *supra* note 356, at 349-90.

<sup>368</sup> See J. BAKER, *supra* note 24, at 156-58; 6 W. HOLDSWORTH, *supra* note 21, at 555-73; J. WALLACE, *supra* note 356, at 347-90, 401-07. According to Baker, one of Mansfield's contributions was to attract "reporters of high calibre," such as Burrow. J. BAKER, *supra* note 24, at 157.

<sup>369</sup> W. HOLDSWORTH, *supra* note 464, at 159.

<sup>370</sup> See *infra* text accompanying notes 387-439.

permitted a plaintiff to omit "all mention of custom, and at trial ask the judge and jury to notice a mercantile custom as warranting the implication of an undertaking, the 'assumpsit,' in the circumstances."<sup>371</sup> Local custom, on the other hand, had to be proven as a fact.<sup>372</sup> A third mode of declaration, pleading on a specific "custom of the realm" used by merchants,<sup>373</sup> was really just a more specific version of the first option, and again the judge and jury would be asked to find an implication of an undertaking warranted by such a custom.

It is clear from Holt's reported decisions that these three options, and particularly the first two, provided a vehicle for extensive reference to mercantile practice. The first two also permitted a good deal of judicial lawmaking, particularly where new issues were presented.<sup>374</sup> But these pleadings long predated Holt, as Baker has demonstrated.<sup>375</sup> The question is "What use did Holt actually make of these preexisting procedures?"

The answer is a bit like the parable of the drinking glass; the glass can be half full or half empty, depending on your expectations. On the one hand, it was Holt, not Mansfield, who forged most of the law of bills of exchange,

<sup>371</sup> Baker, *supra* note 6, at 321.

<sup>372</sup> *Id.*

<sup>373</sup> *Id.*

<sup>374</sup> See, e.g., *Hawkins v. Cardy*, 91 Eng. Rep. 1137 (K.B. 1698) (declaring on the "custom of merchants" that an "apportioned Bill of Exchange cannot be indorsed over for a part only of the money due upon"). According to the court:

And though it was objected by Mr. Northey for the plaintiff, that the plaintiff has made payment of a part to be part of the custom, and therefore it was well enough by the custom. Holt Chief Justice answered, that this is not a particular local custom, but the common custom of merchants, of which the law takes notice; and therefore the Court cannot take the custom to be so.

*Id.* at 1137-38.

In *Mutford v. Walcot*, 91 Eng. Rep. 1283 (K.B. 1701), it was recorded that Holt, in determining whether a bill of exchange had been properly accepted, invited "all eminent merchants in London with him at his chambers . . . they held it to be very common, and usual and a very good practice." *Id.* at 1284.

In *Starke v. Cheeseman*, 91 Eng. Rep. 1259 (K.B. 1700), there was an action on a bill of exchange against a drawer where the drawer refused to pay:

Northey said, that the action was founded upon the custom, and that the obligation arose by that, and therefore the action is maintainable, without shewing a promise.

Holt said that the notion of promises in law was a metaphysical notion, for the law makes no promise, but where there is a promise of the party.

Afterwards . . . judgment was given for the plaintiff, because the drawing of the bill was an actual promise.

*Id.* at 1260. See *Pinkney v. Hall*, 91 Eng. Rep. 118, 118 (K.B. 1697); *Anon.*, 91 Eng. Rep. 119, 119 (K.B. 1699); *Hodges v. Steward*, 91 Eng. Rep. 117, 118 (K.B. 1692).

<sup>375</sup> See Baker, *supra* note 6, at 308-22.

agency, bills of lading, and bailment.<sup>376</sup> Holden has demonstrated that ninety percent of the law merchant developed by the common law was in place when Holt retired in 1710. Some of Mansfield's leading commercial decisions were merely an explication or rationalization of an existing legal structure that had been erected by Holt. As Holden observed, although "it has been suggested from time to time that Mansfield was the founder of commercial law," it was Holt who laid the foundation, without which Mansfield's work would have been impossible.<sup>377</sup> On the other hand, if one reviews Holt's decisions expecting to find galaxies of learned citations to mercantile experts such as Molloy, Malynes or Marius, or references to civilians such as Ridley, Godolphin, or even references to Holt's civilian relative, Thomas Wood, or to any of the great mercantile theorists of the continent, one will be greatly disappointed.<sup>378</sup>

Of course, there was the much admired decision in *Coggs v. Bernard*,<sup>379</sup> in which Holt demonstrated a pretty good understanding of the Roman law of bailment, at least that Roman law found in Bracton, and an even better understanding of the early English common law. Further, it was, for its time, a very long and systematic exposition, prompting Holt to explain that "I have said this much in this case, because it is of great consequence that the law should be settled in this point."<sup>380</sup> In "settling" the law, Holt elaborated six categories of responsibility and care for bailed goods.<sup>381</sup> They were constructed partly from the works of Bracton and other early common law authorities, but they were also based on "good reason," which Holt called "by reason of the necessity of the thing."<sup>382</sup> Holt's justification for the various categories rested upon a determination of the relative benefits of the transaction: the degree of benefit determined the degree of risk.<sup>383</sup> Although there were some citations to Vinnius' commentaries on Justinian, Holt felt it necessary to explain that he used these references, as well as those to Bracton and the early common law treatises, because they were based on "good reason and authority."<sup>384</sup> There were no references to contemporary

<sup>376</sup> See J. HOLDEN, *supra* note 21, at 30. According to Holden:

[Holt] displayed deep learning in dealing with cases arising out of mercantile transactions and deserves almost as honoured a place in the history of commercial law as Lord Mansfield. 'By the end of the seventeenth century the law merchant was practically absorbed into the legal system of the country,' and the largest single contribution to this end was made by Holt.

*Id.* (quoting 1 T. STREET, *THE FOUNDATIONS OF LEGAL LIABILITY* 344 (1906)).

<sup>377</sup> J. HOLDEN, *supra* note 21, at 30 n.1.

<sup>378</sup> See *infra* text accompanying notes 385-441.

<sup>379</sup> See *Coggs v. Bernard*, 92 Eng. Rep. 107 (K.B. 1703).

<sup>380</sup> *Id.* at 114.

<sup>381</sup> *Id.* at 109-10.

<sup>382</sup> *Id.* at 113.

<sup>383</sup> *Id.*

<sup>384</sup> *Id.*



continental rules, or to contemporary civilians, even though the common law precedent was far from clear and Coke's report of *Southcote's Case* was, in large part, disapproved.<sup>385</sup> As Fifoot has observed about Holt's opinion, "The attempt to mark the degrees of carelessness was neither happy nor successful, but the judgement as a whole settled the law of bailment upon the basis of negligence and isolated the common carrier and innkeeper as persons who exercised special trades and owed special duties."<sup>386</sup>

So, in many ways, *Coggs v. Bernard* was remarkable for what it did not do, as well as for what it did. Holt did not go outside the common law tradition in any significant way, though he knew that some substantial new law, or at least a major new exposition of principles, was needed. He demonstrated deep learning, but he eschewed a comparativist perspective, even where the civil law was highly developed.

Holt's knowledge of commercial rules and practices was derived mainly from the common law process: from the assumpsit pleading on the custom of merchants and, to some extent, from the jury. True, the reporters refer to Holt seeking the advice of merchants directly, as in *Mutford v. Walcot*.<sup>387</sup> This, however, was the exception, not the rule, and Holt often took a very different tack toward the commercial world. For example, in *Ward v. Evans*,<sup>388</sup> Holt was asked to decide whether a servant's acceptance of a goldsmith's note in payment of a bill of exchange would bind the master when the goldsmith had declared insolvency.<sup>389</sup> According to Holt, "I am of opinion, and always was (notwithstanding the noise and cry, that it is the use of Lombard Street, as if the contrary opinion would blow up Lombard Street) that the acceptance of such a note is not actual payment."<sup>390</sup>

In *Clerke v. Martin*,<sup>391</sup> a simple promissory note to "plaintiff or his order" was declared "upon the custom of merchants, as upon a bill of exchange."<sup>392</sup> Holt held:

<sup>385</sup> C. FIFOOT, *supra* note 61, at 174-76; *see* *Southcote's Case*, 76 Eng. Rep. 1061 (K.B. 1601).

<sup>386</sup> C. FIFOOT, *supra* note 61, at 164.

<sup>387</sup> 91 Eng. Rep. 1283. In *Mutford*, the issue was whether the plaintiff could bring an action on an acceptance to pay a bill of exchange after the time appointed for its payment. *Id.* at 1284. Holt said "that he remembered a case where an action was brought upon a bill of exchange, and the plaintiff declared upon the bill, where it was negotiated after the day of payment." *Id.* "Holt said that he had all the eminent merchants in London with him at his chamber at Serjeant's Inn in the long vacation about two years ago, and they all held it to be very common, and usual, and a very good practice." *Id.*

<sup>388</sup> 92 Eng. Rep. 120 (K.B. 1704).

<sup>389</sup> *Id.* at 120.

<sup>390</sup> *Id.* at 121.

<sup>391</sup> 92 Eng. Rep. 6 (K.B. 1703); *see* J. HOLDEN, *supra* note 21, at 77-78.

<sup>392</sup> 92 Eng. Rep. at 6.

that this note could not be a bill of exchange. That the maintaining of these actions upon such notes were innovations upon the rules of the Common law; and that it amounted to the setting up a new sort of speciality, unknown to the Common law, and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall. That the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness.<sup>393</sup>

Perhaps the best example of Holt's characteristic concern for commercial practice, as well as his esteem for the integrity of common law doctrine relating to custom, was the famous case of *Buller v. Crips*.<sup>394</sup> Again the issue was whether an endorsee of a simple promissory note could sue the drawer "declar[ing] upon the custom of merchants as upon a bill of exchange."<sup>395</sup> Holt was doubtful:

I remember when actions upon inland bills of exchange did first begin; and there they laid a particular custom between London and Bristol, and it was an action against the acceptor. The defendant's counsel would put them to prove the custom; at which Hale, C.J., who tried it, laughed, and said they had a hopeful case of it. And in my Lord North's time it was said that the custom in that case was part of the common law of England; and these actions since became frequent, as the trade of the nation did increase; and all the difference between foreign bills and inland bills is, that foreign bills must be protested before a public notary before the drawer can be charged, but inland bills need no protest, and the notes in question are only an invention of the goldsmiths in Lombard street, who had a mind to make a law to bind all those that did deal with them; and sure to allow such a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into specialty. And, besides, it would empower one to assign that to another which he could not have himself; for since he to whom this note was made could not have this action, how can his assignee have it? And these notes are not in the nature of bills of exchange; for the reason of the custom of bills of exchange is for the expedition of trade and its safety; and likewise it hinders the exportation of money out of the realm.<sup>396</sup>

The court stayed judgment. The report of the case continued:

At another day, Holt, C.J., declared that he had desired to speak with two of the most famous merchants in London, to be informed of the mighty ill consequences that it was pretended would ensue by obstructing this course; and that they had told him it was very frequent with them to make such notes, and that they looked upon them as bills of

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<sup>393</sup> *Id.*

<sup>394</sup> 87 Eng. Rep. 793 (K.B. 1704).

<sup>395</sup> *Id.* at 793.

<sup>396</sup> *Id.*

exchange, and that they had been used for a matter of thirty years, and that not only notes, but bonds for money, were transferred frequently, and indorsed as bills of exchange. Indeed, I agree, a bill of exchange may be made between two persons without a third; and, if there be such a necessity of dealing that way, why do not dealers use that way which is legal? And may be this; as, if A. has money to lodge in B.'s hands, and would have a negotiable note for it, it is only saying thus, "Mr. B., pay me, or order, so much money value to yourself," and signing this, and B. accepting it; or he may take the common note and say thus, "For value to yourself, pay me (or indorsee) so much," and good.

And the court at last took the vacation to consider of it.<sup>397</sup>

Ultimately Holt refused to recognize the note as transferable.

This mode of proceeding was typical of what Fifoot, in another context, would call Holt's "curious common sense and pedantry."<sup>398</sup> On the one hand, Holt was not reluctant to test notice of the general custom of merchants, and to test it directly. But while this looks like the utilitarianism of Hale, the test was applied within rigid doctrinal walls.

For example, why should one distinguish, under these circumstances, between a bill of exchange and a promissory note? Why the magic in the formula when either form could so easily be manipulated to the same purpose? Holt's answer would most assuredly be the one he gave in *Hodges v. Steward*,<sup>399</sup> which was an action on an inland bill of exchange "upon a special custom in London."<sup>400</sup> There, Holt explained that "for though the Courts take notice of the *law of merchants*, as part of the law of England, yet they cannot take notice of the customs of particular places" unless specially proved or confessed.<sup>401</sup> The goldsmiths could not make local London law, nor, apparently, could the courts. Only those elements of the law merchant that were incorporated as part of the common law of the realm were subject to judicial notice, but that process of incorporation was inherently limited and slow. This accounts for Holt's statement in *Clerke v. Martin*, that a promissory note "is not within the custom of merchants, and, being no specialty, no action can be grounded on it."<sup>402</sup> And it explains Holt's warning in *Carter v. Palmer*:<sup>403</sup> "We will take such a note *prima facie* for evidence of money lent; and though they have declared on the custom, yet we must take care that by such a drift the law of England be not changed by making all notes, bills of exchange."<sup>404</sup>

<sup>397</sup> *Id.* at 794.

<sup>398</sup> C. FIFOOT, *supra* note 61, at 364; *see also* *City of London v. Goree*, 86 Eng. Rep. 192, 192 (K.B. 1677) ("an assumpsit lies upon a bill of exchange accepted").

<sup>399</sup> 91 Eng. Rep. 696 (K.B. 1694).

<sup>400</sup> *Id.* at 696.

<sup>401</sup> *Id.*

<sup>402</sup> 91 Eng. Rep. at 6.

<sup>403</sup> 88 Eng. Rep. 1393 (K.B. 1702).

<sup>404</sup> *Id.* at 1393.

Thus, Holt maintained that the bill of exchange, although "in law no specialty," was given validity by universal custom of merchants.<sup>405</sup> As he stated, "the custom of merchants made the acceptor, drawer or indorser of a bill of exchange liable."<sup>406</sup> The simple promissory note was different. In *Clerke v. Martin*, Holt said that making a simple promissory note transferable within the custom of merchants "amounted to the setting up of a new sort of specialty,"<sup>407</sup> and he refused to do it. Although Holdsworth has

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<sup>405</sup> Holdsworth mistakenly believed that Holt thought that a bill of exchange was a specialty, "in the nature of a contract under seal." See 8 W. HOLDSWORTH, *supra* note 21, at 168. But Holt specifically held in a 1694 case that "A bill of exchange is in law no specialty." See J. HOLDEN, *supra* note 21, at 62; Anon., 90 Eng. Rep. 962, (K.B. 1694).

<sup>406</sup> See *Clerke v. Martin*, 92 Eng. Rep. at 6-7.

<sup>407</sup> *Id.* at 6; see also *Cutting v. Williams*, 87 Eng. Rep. 1160 (K.B. 1702); see *supra* note 33 (discussing the nature of a "specialty").

In *Cutting v. Williams*, Holt said "that a declaration upon the *custom of merchants* upon a note, subscribed by the defendant for so much money, or promising so much money, was void; for it tended to make a note amount to a *specialty*." 87 Eng. Rep. at 1161. See also *Buller v. Crips*, 87 Eng. Rep. 793, 793-94 (K.B. 1704) ("to allow such a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a *parol contract*, into a *specialty*").

Merely declaring upon a "custom of England," to say "that if any person sign a bill to pay money at a day, he ought, by *this custom*, to pay it upon that day" was not enough. *Woolvil v. Young*, 87 Eng. Rep. 710, 710 (K.B. 1703). "[D]eclaring so generally will exclude all consideration which must be averred. Every man is *negotians* in the kingdom, and if the plaintiff would have brought his case within the *custom of merchants*, he ought to have said *commercium habentes*, or have shewn that the bill signed was a *bill of exchange*." *Id.* An earlier case, *Sanfield v. Witherly*, 86 Eng. Rep. 447 (K.B. 1688), was distinguished. "It is true, in the case of *Sanfield v. Witherly*, the declaration was that the defendant *Witherly* was *residens et negotians* at London, etc. without saying *commercium habens*; but it appeared upon the whole frame of the declaration that it was a *bill of exchange*." *Id.* at 367. See also *Cramlington v. Evans and Percival*, 86 Eng. Rep. 456, 458 (K.B. 1691) ("[In] *Sansfield v. Witherly*—that a person, not being a Merchant, drawing a bill of exchange, was bound according to the useage of it amongst merchants, and in declaration upon bills of exchange, the whole matter is to be set forth specially.').

A close examination of *Sansfield* shows that Holt was right. In answer to the proposition that the plea was insufficient "in the matter of it; for the custom is laid for merchants and other persons resident and negotiating at Paris," it was held that "the very drawing of the bill of exchange is a negotiating in itself, and the practice so frequent between all persons, as well as merchants, to negotiate by bills of exchange, that it would prove a great inconvenience, if they should not be of the same effect between others as well as merchants." 86 Eng. Rep. at 449. The court concluded that "the plea of the defendant was insufficient, and that he having drawn this bill was obliged by it, according to the course of bills of exchange." *Id.* Thus it was the bill of exchange itself, not the allegation of the custom, that established the special law.

argued that Holt's view was not progressive, it was consistent with the slow common law development of the assumpsit remedy.<sup>408</sup>

Holdsworth believed that Holt was "wrong headed" over promissory notes,<sup>409</sup> and he argued that "Holt considered that the law had gone far enough. One form of negotiable instrument should suffice."<sup>410</sup> Holt's treatment of promissory notes, however, may have been consistent with his perception of the judicial function and his awareness of legislative remedies. Indeed, it is now known that he was ordered before the House of Lords in connection with the famous Act of 1704,<sup>411</sup> which abolished the holding of *Buller v. Crips* and extended the negotiable features of the bill of exchange to promissory notes.<sup>412</sup> Some have speculated that Holt may have actually

<sup>408</sup> See 8 W. HOLDSWORTH, *supra* note 21, at 168, 173. Cf. Baker, *supra* note 6, at 308-22.

<sup>409</sup> See 8 W. HOLDSWORTH, *supra* note 21, at 173, 175.

<sup>410</sup> *Id.* at 176.

<sup>411</sup> The statute read:

*An act for giving like remedy upon promissory notes, as is now used upon bills of exchange, and for the better payment of inland bills of exchange. Whereas it hath been held, that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person, or his order, any sum of money therein mentioned, are not assignable or indorsible over, within the custom of merchants, to any other person; and that such person to whom the sum of money mentioned in such note is payable, cannot maintain an action, by the custom of merchants, against the person who first made and signed the same; and that any person to whom such note shall be assigned, indorsed, or made payable, could not, within the said custom of merchants, maintain any action upon such note against the person who first drew and signed the same: therefore to the intent to encourage trade and commerce, which will be much advanced, if such notes shall have the same effect as inland bills of exchange, and shall be negotiated in like manner; be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that all notes in writing, that after the first day of May, in the year of our Lord, one thousand seven hundred and five, shall be made and signed by any person or persons, body politick, or corporat, or by the servant or agent of any corporation, banker, goldsmith, merchant, or trader, who is usually intrusted by him, her or them, to sign such promissory notes for him, her, or them, whereby such person or persons, body politick and corporate, his, her, or their servant or agent, as aforesaid, doth or shall promise to pay to any other person or persons, body politick and corporate, his, her or their order, or unto bearer, any sum of money mentioned in such note, shall be taken and construed to be, by virtue thereof, due and payable to any such person or persons, body politick and corporate, to whom the same is made payable; and also every such note payable to any person or persons, body politick and corporate, his, her, or their order, shall be assignable or indorsible over, in the same manner as inland bills of exchange are or may be, according to the custom of merchants;*

3 & 4 Anne., ch. 9 (1704).

<sup>412</sup> See J. HOLDEN, *supra* note 21, at 83 & n.5 (citing *Lord's Journal*, xvii, 653, 664, 676 for the order that Holt attend).

drafted the act.<sup>413</sup> Holt, therefore, may have felt that the *method* of expanding judicial notice of the general custom of merchants—as opposed to proving the local custom—had gone far enough, and that legislation creating negotiability for promissory notes was a more suitable solution.

Holt would not have been alone in looking to legislation. The early eighteenth century saw several commercial statutes directed at bills of exchange. The Payment of Bills Act of 1698<sup>414</sup> extended protest of dishonor, previously reserved as part of “the custom” for foreign bills of exchange,<sup>415</sup> to inland bills. This made “the drawer liable for interest and damages in the event of the dishonor of an inland bill by nonpayment,” as was the case for foreign bills.<sup>416</sup> Other statutes enacted during this period provided for protest for non-conformance for inland bills,<sup>417</sup> made false endorsement of a note a forgery and a felony without benefit of clergy,<sup>418</sup> and made false acceptance of a note a forgery and a felony.<sup>419</sup> Far from being a reactionary, Holt may simply have recognized the need for certainty and generality in the law of negotiable instruments. If the result was to require legislative action, it was a fairly modern solution!

This is not to belittle Holt’s achievements within the confines of the assumpsit remedy. His decision in *Hussey v. Jacob*,<sup>420</sup> which protected the

<sup>413</sup> See J. HOLDEN, *supra* note 21, at 84; 8 W. HOLDSWORTH, *supra* note 21, at 173.

<sup>414</sup> 9 & 10 Will. 3, ch. 17 (1698).

<sup>415</sup> See J. HOLDEN, *supra* note 21, at 54-55; see *Brough v. Parkings*, 92 Eng. Rep. 161, 162 (K.B. 1704) (in which Holt observed that for inland bills, “no protest was necessary by the common law, but by this statute”).

<sup>416</sup> J. HOLDEN, *supra* note 21, at 54-55.

<sup>417</sup> An Act for Giving Like Remedy Upon Promissory Notes, as is Now Used Upon Bills of Exchange, and for the Better Payment of Inland Bills of Exchange, 3 & 4 Ann., ch. 9 (1704).

<sup>418</sup> An Act for the More Effectual Preventing and Further Punishment of Forgery, Perjury and Subornation of Perjury; and to Make it Felony to Steal Bonds, Notes or Other Securities for the Payment of Money, 2 Geo. 2, ch. 25 (1729).

<sup>419</sup> An Act for the More Effectual Preventing the Forging the Acceptance of Bills of Exchange, or the Numbers or Principal Sums of Accountable Receipts for Notes, Bills, or Other Securities for Payment of Money, or Warrants or Orders for Payment of Money, or Delivery of Goods, 7 Geo. 2, ch. 22 (1733).

<sup>420</sup> 92 Eng. Rep. 929 (K.B. 1697). In *Hussey*, plaintiff declared upon the custom of merchants that “if a bill of exchange is drawn upon a person, and he accepts . . . he is liable to pay it.” *Id.* at 930. Holt held that this is true when the bill is accepted to a stranger “for just debt,” although this was not the case here. *Id.*; see also *Anon.*, 91 Eng. Rep. 118, 119 (K.B. 1704) (holding that “trover for a bank bill will lie against a person finding it, but not against his assignee”). Such decisions caused Holden to remark that “[a] chariot had been driven through the hitherto impregnable lines of the common law maxim *nemo dat quod non habet* [no one gives what he does not possess]. That chariot was driven by Holt C.J. . . . and the motive power was simply ‘the course of trade’; in other words, ‘the custom of merchants.’” J. HOLDEN, *supra* note 21, at 64-65.

bona fide purchaser for value "by reason of the course of trade," was the cornerstone of the modern negotiable bank note. His requirement of reasonable notice to protect the drawer,<sup>421</sup> his protection of the endorser in the absence of the drawer's default,<sup>422</sup> his articulation of the theory of endorser liability,<sup>423</sup> and his definition, in *Lambert v. Pack*,<sup>424</sup> of precisely what must be proved to charge an endorser,<sup>425</sup> were central to the development of a complete law of negotiable instruments. Outside of the assumpsit remedy, Holt developed the modern principle of an employer's liability for employee's torts,<sup>426</sup> and freed the law of bailment from the mire of medieval cases.<sup>427</sup> Holt also developed the modern notion of the apparent authority of an agent in business matters,<sup>428</sup> rationalized "bearer" bills, and articulated precise reasons for treating "to order" bills differently from other bills in order to treat endorsees more fairly.<sup>429</sup> He even developed the assignability of bills of lading.<sup>430</sup>

<sup>421</sup> Anon., 91 Eng. Rep. at 118-19.

<sup>422</sup> See *Brough v. Parking*, 92 Eng. Rep. 161 (K.B. 1704). As Holt stated:

In this case, as well as upon a foreign bill of exchange, the plaintiff must give convenient notice to the drawer, of the non-payment of the bill, for if the drawer receive prejudice by the plaintiff's delay, the plaintiff shall not recover. A protest on a foreign bill is part of the custom, on an inland bill no protest was necessary by the common law, but by this statute [9 & 10 Will. 3 ch. 17].

*Id.* at 162.

<sup>423</sup> According to Holt, "the indorsement is *quasi* a new bill, and a warranty by the indorser, that the bill shall be paid and the party may bring his action against any of the indorsers, if the bill be not paid by the acceptor." Anon., 90 Eng. Rep. 962 (K.B. 1694). See J. HOLDEN, *supra* note 21, at 127.

<sup>424</sup> 91 Eng. Rep. 120 (K.B. 1700); see *Lambert v. Oakes*, 91 Eng. Rep. 1194 (K.B. 1700); J. HOLDEN, *supra* note 21, at 58-59.

<sup>425</sup> 91 Eng. Rep. at 120.

<sup>426</sup> See *Boson v. Sandford*, 91 Eng. Rep. 382 (K.B. 1691); A. HARDING, *supra* note 23, at 307; see also 8 W. HOLDSWORTH, *supra* note 21, at 474.

<sup>427</sup> See *Coggs v. Bernard*, 92 Eng. Rep. 107 (K.B. 1703); Plunkett, *The Relations Between Roman Law and English Common Law Down to the Sixteenth Century: A General Survey*, 3 U. TORONTO L. J. 24, 44 (1939); see also 8 W. HOLDSWORTH, *supra* note 21, at 452.

<sup>428</sup> See *Sir Robert Wayland's Case*, 91 Eng. Rep. 797 (1701); *Middleton v. Fowler*, 91 Eng. Rep. 247 (1699); see also *Boulton v. Arlson*, 91 Eng. Rep. 797, 797 (1701) (in which Holt held that "a note under the hand of an apprentice shall bind his master, where he is allowed to deliver out notes though the money is never applied to the master's use").

<sup>429</sup> See *Nicholson v. Sedgwick*, 91 Eng. Rep. 1016, 1016 (K.B. 1703):

[F]or there can be no great inconvenience, because the indorsement of the party must appear upon the back of the Note, or some other thing sufficiently intimating his assent; but where it is payable to the party or bearer—if lost by accident, . . . any one who finds the Note by accident may bring the action . . . and though this last has been frequently attempted, it has never yet prevailed.

*Id.*

<sup>430</sup> See *Evans v. Marlett*, 91 Eng. Rep. 1078 (K.B. 1703). According to Holt, "the

Holt accomplished this doctrinal renaissance practically without direct reference to any mercantile treatises, civilian sources, or foreign laws. He was also relatively inflexible, even unreasonable, in issuing prohibitions to the Admiralty in technical matters, such as whether hypothecation secured a ship captain's wages,<sup>431</sup> or where the pleadings were careless, i.e., failed to mention that a ship's "capture was super altum mare," although they implied it.<sup>432</sup>

Holt was not ignorant of civilian doctrine or unable to obtain civilian sources, as his treatment of the occasional civil law matter that touched on his jurisdiction demonstrated.<sup>433</sup> The observation that "[t]here is no evidence that [Holt] was learned, as Lord Mansfield was learned, in the civil law or in foreign systems of commercial law,"<sup>434</sup> is only true if Holt is contrasted with Mansfield, an acknowledged master. More significantly, however, Holt was a true student of Hale, and like Hale, Holt appreciated the need to demonstrate the utility of legal rules.<sup>435</sup>

Holdsworth has argued that "[i]f Holt had been more learned in foreign systems of law, he might have been tempted to introduce their principles in bulk."<sup>436</sup> Holdsworth then suggests that this would have resulted in a "commercial law, though administered by the common law courts, [that] would have remained a very separate branch of the common law."<sup>437</sup> Both of these propositions are doubtful. In fact, Holt proceeded as he did because of his understanding of the way custom was recognized by judges as a source of the common law. Mercantile customs, observed Baker, "were either local facts or they were the common law of England. In so far as the judges took notice of such customs as common law, they were not taking over for their own use a pre-existing body of jurisprudence."<sup>438</sup> This is why Holt relied so little on mercantile treatises or civilian authority. And this is why Baker is right in his observation that "[t]o the extent that there was a law merchant before Lord Mansfield, it was not an importation from the *ius gentium*."<sup>439</sup>

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consignee of a bill of lading has such a property as that he may assign it over." *Id.* at 1078.

<sup>431</sup> See *Clay v. Snelgrave*, 91 Eng. Rep. 1285, 1286 (K.B. 1706).

<sup>432</sup> See *Shermoulin v. Sands*, 91 Eng. Rep. 1078 (K.B.); *Jones v. Stone*, 91 Eng. Rep. 1286 (K.B. 1706).

<sup>433</sup> See, e.g., *Rex v. Raines*, 91 Eng. Rep. 1281, 1283 (K.B. 1706) (in which Holt discusses the civil law as it pertains to which representatives are entitled to a distributive share of an intestate's estate).

<sup>434</sup> 6 W. HOLDSWORTH, *supra* note 21, at 521.

<sup>435</sup> See *supra* text accompanying notes 317-45.

<sup>436</sup> 6 W. HOLDSWORTH, *supra* note 21, at 522.

<sup>437</sup> *Id.*

<sup>438</sup> Baker, *supra* note 6, at 321.

<sup>439</sup> *Id.* According to Holdsworth, "Coke had conquered large commercial jurisdiction for the common law. Holt made good progress in the settlement of this domain on common law principles." 6 W. HOLDSWORTH, *supra* note 21, at 522.



It is wrong, however, to characterize Holt's jurisprudence as uninformed by international commercial custom.<sup>440</sup> Because the English civilian jurists offered little improvement over the common law treatment of mercantile instruments, including bills of exchange,<sup>441</sup> there was little reason to seek their aid. But the civilians' comparativist and humanist spirit, which had influenced Hale, was not lacking from Holt's jurisprudence. Constantly looking to the utility and fairness of commercial rules, Holt was alert to the need for a progressive and principled commercial law. The author of *Coggs v. Bernard* and *Buller v. Crips* was no Mansfield, but he was certainly no Coke, either.

## 2. William Murray, Lord Mansfield

William Murray, Lord Mansfield (1705-1793), was Chief Justice of the King's Bench from 1756 until 1788. Holt was Chief Justice from 1689 to 1710. Their combined tenures represent over half a century in the most influential legal position in England. They both esteemed that office over any other available, and to keep it both declined invitations to become Lord Chancellor, as well as other powerful positions.<sup>442</sup> They shared a faith in judge-made

<sup>440</sup> As Baker points out, "without doubt internationally current moral views and economic practices informed this branch of the law as they informed others." Baker, *supra* note 6, at 321.

<sup>441</sup> See *supra* text accompanying notes 210-51 (discussing civilian "bills of exchange" theory).

<sup>442</sup> See *supra* note 364 and sources cited (discussing Holt's career). As with Holt, there is no modern comprehensive scholarly biography of William Murray. For the best modern accounts, see C. FIFOOT, *LORD MANSFIELD* (1936); E. HEWARD, *supra* note 353. Fifoot has more extensive doctrinal coverage, but Heward had available to him the newly discovered notebooks. See *supra* note 353. For earlier accounts, see 2 J. CAMPBELL, *supra* note 364, at 302-584; 1 DNB, *supra* note 276, at 1452; 12 W. HOLDSWORTH, *supra* note 21, at 464-605 (1st ed. 1938); W. HOLDSWORTH, *SOME MAKERS OF ENGLISH LAW 160-75* (1966); J. HOLLIDAY, *THE LIFE OF WILLIAM, LATE EARL OF MANSFIELD* (London 1797).

Some of the best materials on Mansfield can be found in law review articles. See, e.g., Arnold, *Lord Mansfield*, 15 TENN. L. REV. 687 (1939); Fiddes, *Lord Mansfield and the Sommersett Case*, 50 LAW. Q. REV. 499 (1934); Holdsworth, *Lord Mansfield*, 53 LAW Q. REV. 221 (1937); Nadelhaft, *The Somersett Case and Slavery: Myth, Reality, and Repercussion*, 51 J. NEGRO HIST. 193 (1966); Nathan, *Lord Mansfield*, 5 S. AFRICAN L.J. 207 (1936); Schreiber, *Lord Mansfield—The Father of Insurance Law*, 1960 INS. L.J. 766 (1960); Shaw, *Enlightenment of Lord Mansfield*, 8 J. COMP. LEG. 1 (3d series 1926); Shientag, *Lord Mansfield Revisited—A Modern Assessment*, 10 FORDHAM L. REV. 345 (1941); Waterman, *Mansfield and Blackstone's Commentaries*, 1 U. CHI. L. REV. 549 (1934); Wiecek, *Somersett: Lord Mansfield and the Legitimacy of Slavery in the Anglo-American World*, 42 U. CHI. L. REV. 86 (1974); Paper by Kenneth M. Holland, *The Jurisprudence of Lord Mansfield*, delivered to the American Society for Legal History (Oct. 24-25, 1980). I believe that the new

law, using the reported judicial case as a vehicle for reform, and, despite some evidence of corruption on Mansfield's part, their dedication to the rule of law was such that both faced either impeachment or angry mobs in its name.<sup>443</sup> Even their jurisprudential achievements were similar; both made major contributions to the laws of personal freedom, the law of business and trade, and to the critical legal status of English law in the colonies.<sup>444</sup> Mansfield's reported cases show, as one would expect, an intimate knowledge of Holt's decisions.<sup>445</sup>

In spite of their similarities, their juristic styles were in sharp contrast. Holt was a focused problem solver, and Mansfield, a bold, free-ranging theorist. On the issue of incorporation of mercantile practice and foreign legal ideas, this difference in style became one of substance.

First, Mansfield was a Scot with a classical English education. While some have doubted Holt's familiarity with Roman law and foreign legal systems, Mansfield's knowledge is indisputable. A younger son of a poor, Jacobite Scottish peer, Mansfield studied, through the charity of friends, at Christ Church, Oxford. There he attended lectures on Justinian's *Digest* and translated Cicero into English and back into Latin.<sup>446</sup> Surviving scraps of his student exercises show that Mansfield was, even as a young man, a genuine classicist. This is all quite apart from his portentous defeat of the young William Pitt for the Latin poetry prize on the death of George I, which earned him a lifelong enemy. Years later, the influence of this curriculum emerged in Mansfield's famous outlines of recommended study, prepared for the heir to the Duke of Portland. These displayed a profound and rich

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research now undertaken by James C. Oldham will be of particular significance. See Oldham, *supra* note 353, at 140 n.13.

Mansfield also had his literary associations, and is noted in the contemporary literature by the likes of Samuel Johnson, Alexander Pope, and James Boswell. See, e.g., E. HEWARD, *supra* note 353, at 13-16; 4 A. POPE, *IMITATIONS OF HORACE* 151, 175, 237-39, 374 (J. Butt ed. 1961) (1st ed. London 1737); Rice, *Samuel Johnson, LL.D., on Law, Lawyers, and Judges*, 63 A.B.A. J. 1217, 1219 (1977); see also *supra* note 353.

<sup>443</sup> See 2 J. CAMPBELL, *supra* note 364, at 124-29; 1 DNB, *supra* note 276, at 993, 1452.

<sup>444</sup> For Holt's contributions, see 2 J. CAMPBELL, *supra* note 364, at 139 (discussing one of Holt's opinions concerning an action for the price of a slave). As Holt stated in *Smith v. Gould*, 92 Eng. Rep. 338, 338 (K.B. 1707), "Trover does not lie for a black man more than for a white. By the common law no man could have a property in another man." *Id.* at 338. As for Mansfield, see Shientag, *supra* note 442, at 358-59 (describing the effect of *Sommerset's Case* and quoting Mansfield's great statement that "[t]he air of England has long been too pure for a slave, and every man is free who breathes it"). See generally Fiddes, *supra* note 442; Nadelhaft, *supra* note 442; Wiecek, *supra* note 442.

<sup>445</sup> See *infra* text accompanying notes 468-75.

<sup>446</sup> See 1 DNB, *supra* note 277, at 1452; C. FIFOOT, *supra* note 442, at 27-30.

understanding of both classical and humanist legal studies.<sup>447</sup> Mansfield's interests, however, were not limited to Roman law. His outlines and personal studies included many modern civilians, such as Grotius, Pufendorf, Vinius, and Burlamaqui, and he was familiar with France's attempt to rationalize commercial custom by the *Ordonnance de la Marine* in 1681.<sup>448</sup>

Mansfield's Scottish connections, and the patronage of Talbot and Yorke, secured him a Scottish appeals practice before the House of Lords. This further developed his learning. His early Scottish appellate cases "enabled him to display his culture and gratify the court by judicious selections from the law of nations, of Scotland and of Moses."<sup>449</sup> His Scottish origins may have been a major social and professional handicap in some respects, but those origins led him to the unusual opportunities of this early law practice. Scottish appeals practice included explaining issues of Scottish law, with all of its civilian underpinnings, to English jurists. It practically forced Mansfield to be a comparativist, and led to professional success. Later, this success would attract bitter political attacks, including accusations that Mansfield was a secret Jacobite, a Catholic, and an absolutist. He was also charged "with the black offense of corrupting the ancient simplicity of the common law with principles drawn from the corpus juris."<sup>450</sup> Ironically, these vicious attacks were identical to the libels suffered by the earlier English civilians.<sup>451</sup>

Did Mansfield's civilian learning affect his jurisprudence? Again, we turn to our chosen "litmus test," commercial law and particularly bills of exchange. Shientag attempted to summarize all of Mansfield's contribution to the law of negotiable instruments in just one rather remarkable sentence!

In Negotiable Instruments, he [Mansfield] harmonized the rules relating to the foreign bill of exchange, the inland bill of exchange, and the promissory note; he insisted on the rights of the innocent holder for value; he reiterated the principle that negotiable instruments were currency; he laid down the rule that the holder of a bearer note could maintain an independent action; he upheld the negotiability of bearer notes by delivery; he ruled that an acceptor who accepted a forged bill and paid it to a *bona fide* holder, could not recover the payment from

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<sup>447</sup> Mansfield's outlines covered the study of ancient and modern history (for the "Use of the Duke of Portland") and legal study. See J. HOLLIDAY, *supra* note 442, at 12-13 (reprinting the letters on ancient and modern history); see generally A TREATISE ON THE STUDY OF THE LAW, CONTAINING DIRECTIONS TO STUDENTS WRITTEN BY . . . THE LORDS MANSFIELD, ASHBURTON, AND THURLOW (London 1797).

<sup>448</sup> See *supra* note 75; 2 J. CAMPBELL, *supra* note 364, at 327-28; C. FIFOOT, *supra* note 442, at 30; R. VALIN, NOUVEAU COMMENTAIRE SUR L'ORDONNANCE DE LA MARINE, DU MOIS D'AOUT 1681, in (Legier 1760)

<sup>449</sup> C. FIFOOT, *supra* note 442, at 35.

<sup>450</sup> 1 DNB, *supra* note 277, at 1452.

<sup>451</sup> See Coquillette, *supra* note 68, at 84-87.

such holder; he emphasized the necessity for certainty in determining what was a reasonable time for presenting a bill or giving notice of dishonor and the advisability of having the court determine that question, where possible, and he invoked the doctrine of equitable estoppel, where one placed in the hands of a broker a bill of lading so endorsed that the broker could deceive an innocent third party into believing that the broker owned the goods.<sup>452</sup>

For the most part, Shientag accurately describes Mansfield's achievements, but he also claims too little and too much in terms of Mansfield's contributions to the law merchant. And he hides a major controversy. Let us start with the controversy.

Much of our view of Mansfield derives from Mr. Justice Buller's great tribute in *Lickbarrow v. Mason*,<sup>453</sup> one year before Mansfield's retirement:

Thus the matter stood till within these thirty years; since that time the commercial law of this country has taken a very different turn from what it did before. . . . Before that period we find that in Courts of Law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time we all know that great study has been made to find some certain general principles, which shall be [made] known to all mankind, not only to rule the particular case then under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged, and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country.<sup>454</sup>

Buller's opinion has been reinforced by Fifoot, Mansfield's most extensive legal biographer, who considered Mansfield "the founder of commercial law,"<sup>455</sup> and by Beutel, who described Mansfield as "the founder of modern English Commercial law."<sup>456</sup>

Our examination of Holt has demonstrated that these accolades of Mansfield claim too much. Buller was simply wrong that Holt left everything to juries and produced "no established principles." While the notice of mercantile custom was limited, it was not always put to juries as a question of fact, as with a local custom. Holt, in fact, settled a great deal of law.<sup>457</sup>

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<sup>452</sup> Shientag, *supra* note 442, at 352 (citations omitted).

<sup>453</sup> 100 Eng. Rep. 35 (K.B. 1787).

<sup>454</sup> *Id.* at 40.

<sup>455</sup> C. FIFOOT, *supra* note 442, at 239.

<sup>456</sup> Beutel, *supra* note 69, at 545.

<sup>457</sup> See, e.g., J. HOLDEN, *supra* note 21, at 113 ("[It] was Holt who commenced to take judicial notice of some of the more important mercantile customs, but it was Mansfield who finally adopted this policy as a general practice.").

Not surprisingly, therefore, a rival group has emerged, consisting of such diverse bedfellows as Baker and Lord Campbell, who have challenged some of the claims made for Mansfield as a creative genius. Campbell insisted that Mansfield "cannot be considered a man of original genius. With great good sense, he adapted, he improved—but he never invented."<sup>458</sup> Holden, a moderate member of this faction, correctly observed that Holt "commenced to take judicial notice of some of the more important mercantile customs," but that "Mansfield's work was certainly not confined to the re-definition of existing principles."<sup>459</sup>

Both of these warring groups focus too much on doctrine and not enough on the judicial process. Mansfield certainly did not invent the modern law of negotiable instruments. As we have seen, it was largely in place at Holt's death.<sup>460</sup> Yet Mansfield was the father of the modern judicial attitude toward commercial law, and in this he owed a great deal to civilian jurisprudence—a debt he candidly acknowledged.

Because Mansfield was not a treatise writer, law teacher, or publisher of legal tracts, we must, as we did with Holt, accept the fragmented, ad hoc evidence of reported cases. But we have an advantage here: the quality and modern format of Sir James Burrow's *Reports*, in which many of Mansfield's opinions appear. Burrow's *Reports* have a high reputation and have even been described, rather floridly, as "works of art."<sup>461</sup> Their careful division of the case into facts stated, argument of counsel, and judicial opinion, gave Mansfield one more advantage over Holt: we know what he really meant to decide. Rather ungenerously, Mansfield was quoted as saying that "Sir James Burrow's Reports were not always accurate."<sup>462</sup>

But even Burrow's *Reports* cannot remedy the problem of deciding principles ad hoc, in isolated cases. Thus, to understand the evolution of Mansfield's judicial philosophy, we will have to look at two lines of case development. Not only will we look at cases relating to a specific topic in chronological order, focusing again on bills of exchange and negotiable instruments, but we will examine some doctrinally unrelated cases that nevertheless illustrate relevant points about Mansfield's use of the judicial

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<sup>458</sup> *Id.* at 113; 4 J. CAMPBELL, *supra* note 364, at 576; Baker, *supra* note 6, at 290-91, 315, 320-22.

<sup>459</sup> J. HOLDEN, *supra* note 21, at 113.

<sup>460</sup> See *supra* notes 420-25, 429-30 and accompanying text.

<sup>461</sup> J. WALLACE, *supra* note 356, at 449.

<sup>462</sup> *Id.* at 451. Lord Campbell was reported to have stated, "As Lord Mansfield himself has said, Sir James Burrow's Reports were not always accurate." *Id.* (citing *Regina v. Newton*, 30 Eng. L. & Eq. Rep. 367, 368 (K.B. 1855)). Wallace believes that this statement, ironically, is a misquote and that an accurate report of Campbell's remark is contained at 4 Ellis & Black. Rep. at 869, which quotes Campbell as follows: "I may say of that, as Lord Mansfield himself said, when speaking of Sir W. Blackstone, that what is reported is not always accurate." J. WALLACE, *supra* note 356, at 451.

process. The latter will not enlighten us much about commercial law doctrine, but will illustrate how civilian methodology became a part of Mansfield's judicial style. This had a great impact on his commercial cases, and on many of his decisions unrelated to commercial law.

For example, Mansfield demonstrated his remarkable knowledge of Roman law in *Windham v. Chetwynd*,<sup>463</sup> just one year after his appointment to the bench. The case had nothing to do with law merchant, but it did demonstrate the determination of the new judge to appeal to universal and comparative standards in defending a decision, as well as to practical principles of utility and fairness. A will was being disputed. A creditor had been one of the three witnesses to the will. At issue was the meaning of the requirement, under the Statute of Frauds, of "three credible witnesses."<sup>464</sup> Mansfield traced the Roman law of testament from the *Twelve Tables* to Justinian's *Digest*, demonstrating a genuine familiarity with Roman law and an extraordinary willingness to apply Roman standards to interpret an English statute.<sup>465</sup> Finding no historical bases for disqualifying a creditor from being a subscribing witness, Mansfield concluded that to presume witnesses were not credible because they had an "interest at the time of subscription" due to a charge "to pay debts" would be "against Justice and Truth."<sup>466</sup> He then turned to a practical consideration, observing that "[t]he Persons attendant upon a dying Testator . . . are generally in *some Degree Creditors* . . . Servants, Parson, Attorney, Apothecary, etc; And the disallowing such Persons to be Witnesses can not answer *Ends of public Utility*."<sup>467</sup> Roman law and appeal to public utility; the message was plain: Mansfield intended to give opinions that not only established rules, but persuaded with their dual appeal to universal reason and practical fairness.

Mansfield decided his first important negotiable instrument case one year later, in *Miller v. Race*.<sup>468</sup> There, he reasserted the rights of the innocent holder for value. A mail coach had been robbed. The thief had taken a bank note, which ended up in the hands of the plaintiff "for a full and valuable consideration, and in the usual course . . . of his business."<sup>469</sup> Of course, the owner of the note had stopped payment. The bearer, citing Holt, argued that the owner of a bank bill would have trover against a stranger who found it, except when the finder transferred it for a valuable consideration, which "by

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<sup>463</sup> 97 Eng. Rep. 377 (K.B. 1757).

<sup>464</sup> *Id.* at 379.

<sup>465</sup> *Id.* at 384. As to Mansfield's familiarity with Roman and Continental sources, see Rodgers, *Continental Literature and the Development of the Common Law by the King's Bench c. 1750-1800*, in 2 COMPARATIVE STUDIES IN CONTINENTAL AND ANGLO-AMERICAN LEGAL HISTORY (to be published, 1987).

<sup>466</sup> 97 Eng. Rep. at 387

<sup>467</sup> *Id.*

<sup>468</sup> 97 Eng. Rep. 398 (K.B. 1758).

<sup>469</sup> *Id.* at 398.

reason of the *Course of Trade* creates a Property in the . . . Bearer."<sup>470</sup> The owner, however, argued that the note "remains in the Man's Hands, and is not come into the Course of Trade,"<sup>471</sup> because the theft could not be regarded as wilfully introducing the note into the "Course of Trade." Rejecting this argument, Mansfield observed that "Ld., Ch. J. *Holt* could never say That an Action [in trover] would lie against the Person who, *for a valuable Consideration*, had received a *Bank-Note* which had been stolen or lost, and *bona fide paid to him*."<sup>472</sup> He noted that Holt had decided otherwise just two years before the case cited by the bearer. Bank notes, concluded Mansfield, "are not like Lottery-Tickets, but *Money* . . . paid and received as *Cash*: And it is necessary, for the Purpose of Commerce, that their *Currency* should be *established* and *secured*."<sup>473</sup> Mansfield didn't invent the notion of negotiable bank notes, but Mansfield restated the principle of negotiability in modern terms that could not be misinterpreted.

That same year, in *Heylyn v. Adamson*,<sup>474</sup> Mansfield did more than merely restate Holt. In that case, Mansfield reexamined the legal differences between the three major classes of mercantile instruments: foreign bills of exchange, inland bills of exchange, and promissory notes. In so doing, he reaffirmed the different treatment of foreign bills of exchange and promissory notes, but held that foreign and inland bills should be treated identically, characterizing as erroneous a number of decisions allegedly to the contrary "quoted" to "My Ld. Ch. J. *Holt*."<sup>475</sup> According to Mansfield, the difference between foreign bills and promissory notes was required by practical considerations. Whereas the holder of a promissory note was required to make a demand on the original drawer before suing an endorser, the same requirement would be impracticable under a foreign bill of exchange, since the drawer often lived abroad, "perhaps in the Indies."<sup>476</sup> Applying these same practical considerations, Mansfield saw no reason to distinguish between foreign and inland bills of exchange, observing that "except as to Degree of Inconvenience; All the Arguments from Law and the Nature of a Transaction, are exactly the same in both cases."<sup>477</sup> Although Mansfield drew heavily from an earlier foreign bill case of 1713, it was the exposition in *Heylyn* that settled the law.

In the next three years, Mansfield gave three of his most important

<sup>470</sup> *Id.* at 399.

<sup>471</sup> *Id.*

<sup>472</sup> *Id.* at 402.

<sup>473</sup> *Id.*

<sup>474</sup> 97 Eng. Rep. 503. (K.B. 1758).

<sup>475</sup> *Id.* at 507 (citing *Bromley v. Frazier*, 93 Eng. Rep. 662 (K.B. 1722)). James S. Rogers has suggested to me that Mansfield might have thought that Holt's cases may have actually involved notes, and not bills.

<sup>476</sup> *Id.*

<sup>477</sup> *Id.*

opinions: *Luke v. Lyde*,<sup>478</sup> *Moses v. Macferlan*,<sup>479</sup> and *Edie v. East India Company*.<sup>480</sup> *Luke* and *Edie* were important commercial cases. *Moses*, while a case on quasi-contract and not a commercial case, clearly illustrates Mansfield's mode of juristic analysis. Taken together, they illustrate Mansfield's still young judicial philosophy.

*Luke v. Lyde*, the now famous story of privateering, salvage, and freight, is a study in Mansfield's attention to the *ius gentium*. After hearing extensive argument citing Malynes and Molloy, the great popularizers of the law merchant,<sup>481</sup> Mansfield canvassed the *Rhodian Laws*, the *Consolato de Mare*, the *Laws of Oleron*, the *Laws of Wisby*, and the "Ordinance of Lewis the fourteenth"<sup>482</sup>—all to determine ratable freight on a cargo of Newfoundland fish. Mansfield explained his comprehensive survey in one sentence: "the Maritime Law is not the Law of a particular Country, but the general Law of Nations: '*Non erit alia Lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque Lex obtinebit.*'"<sup>483</sup> Such universal standards were needed "[n]ot only for the greater Satisfaction of the Parties in the particular Cause, but to prevent other Disputes, by making the rules of the Law and the Ground upon which they are established *certain* and *notorious*."<sup>484</sup> It could have been Zouche, Gentilis, or Ridley speaking, but it was Mansfield.

If *Luke v. Lyde* established Mansfield's attention to the *ius gentium*, *Moses v. Macferlan* established his interest in moral obligation, unjust enrichment, and actions "*ex aequo et bono*."<sup>485</sup> The issue was whether the plaintiff could recover for unjust enrichment directly through an action upon the case for money had and received, instead of having to bring "a special action upon the contract."<sup>486</sup> Holding that the special action was not required, Mansfield stated:

One great benefit, which arises to suitors from the nature of *this* action, is, that the *Plaintiff needs not state the Special Circumstances*

<sup>478</sup> 97 Eng. Rep. 614 (K.B. 1759).

<sup>479</sup> 97 Eng. Rep. 676 (K.B. 1760).

<sup>480</sup> 97 Eng. Rep. 797 (K.B. 1761).

<sup>481</sup> See Coquillette, *supra* note 30, at 356-70.

<sup>482</sup> 97 Eng. Rep. at 619.

<sup>483</sup> *Id.* at 617.

<sup>484</sup> *Id.* at 617-18.

<sup>485</sup> 97 Eng. Rep. at 679. See the very helpful article by P. Birks, *English and Roman Learning in Moses v. Macferlan*, 1984 CURRENT LEGAL PROBS. 1:

We have seen that Lord Mansfield used the Roman learning to settle the answer to the question, when does a man have and receive money to another's use? It is well known that the English root which, so to say, he brought to Roman flower, was the action of account.

*Id.* at 22.

<sup>486</sup> *Id.* at 676.



from which he concludes "that, *ex aequo & bono*, the Money received by the Defendant, ought to be deemed as belonging to him:" he may *declare generally*, "that the Money was received to his Use;" and make out his Case, at the Trial.<sup>487</sup>

. . . .

If one Man takes another's Money to do a Thing, and refuses to do it; it is a Fraud: And it is at the *Election* of the party injured, either to affirm the Agreement, by bringing an Action for the Non-performance of it; or to disaffirm the Agreement *ab initio*, by reason of the Fraud, and bring an Action for Money had and received to his Use.

The Damages recovered in that Case, shew the *Liberality* with which this kind of Action is considered: for though the Defendant received From the Plaintiff £262 10s. yet the *Difference Money Only*, £175 was retained by him against Conscience: And therefore the plaintiff, *ex aequo et bono*, ought to recover *no more*; agreeable to the rule of the Roman law—"Quod conditio indebiti non datur ultra, quam locupletior factus est, qui accepit."<sup>488</sup>

. . . .

This kind of equitable Action, to recover back Money, which ought not in justice to be kept, is *very beneficial*, and therefore *much encouraged*. It lies only for Money which, *ex aequo et bono*, the Defendant ought to refund[.]<sup>489</sup>

. . . .

In one Word, The Gist of this kind of Action is, that the Defendant, upon the Circumstances of the Case, is *obliged by the Ties of natural Justice and Equity* to refund the Money.<sup>490</sup>

If *Luke v. Lyde* reads like it was decided by Godolphin in the Admiralty, *Moses v. Macferlan* sounds like a case in the Chancery decided by an extraordinary chancellor. Indeed, it sounds as if it were decided by Francis Bacon.

One year after deciding *Moses v. Macferlan*, Mansfield encountered directly the theoretical problems of incorporation in *Edie v. East India Company*. The issue was whether a bill of exchange endorsed by a payee to "pay A," but which did not include an "or order" clause, could be transferred by A. Mansfield allowed evidence of mercantile usage to be put to the jury, who found that the form of the endorsement precluded transfer. On motion for a new trial, Mansfield learned of two prior cases to the contrary.<sup>491</sup> In setting aside the verdict, Mansfield explained: "Since the trial I have looked into the cases . . . I ought not to have admitted any evidence of the particular usage

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<sup>487</sup> *Id.* at 679 (quote is in original form used by Lord Mansfield in 2 Burrow's Reports \*1010-\*1012).

<sup>488</sup> *Id.* at 680.

<sup>489</sup> *Id.*

<sup>490</sup> *Id.* at 681.

<sup>491</sup> See J. HOLDEN, *supra* note 21, at 118. The cases were *More v. Manning*, 92 Eng. Rep. 1087 (K.B. 1718) and *Acheson v. Fountain*, 93 Eng. Rep. 698 (K.B. 1722).

of merchants in such a case. Of this, I say I am now satisfied; for the law is already settled."<sup>492</sup>

This, of course, represented the conceptual "end of the line" for growth in the commercial law through evidence of mercantile usage. Mansfield's desire to do practical justice in accordance with commercial utility conflicted, not with any slavish adherence to legal precedent, but with another demand of commercial utility—certainty, which Mansfield later recognized to be the "great object" in "all mercantile transactions."<sup>493</sup> It was an inherently irreconcilable conflict: the practical cost of incorporation of mercantile practice into rigid law as opposed to leaving it as a factual issue. As Mansfield would later say in *Buller v. Harrison*:<sup>494</sup> "I desire nothing so much as that all questions of mercantile law be fully settled and ascertained; and it is of much more consequence that they should be so, than which way the decision is."<sup>495</sup> Later, in *Hankey v. Jones*,<sup>496</sup> Mansfield confirmed his preferences:

I desired a case to be made for the opinion of the Court, for the sake of that, which perhaps is more important than doing right: to bring all questions upon mercantile transactions to a certainty. General verdicts do not answer the purpose: but when a case is made, the profession know the result, the merchants know the result . . . .<sup>497</sup>

In *Grant v. Vaughan*,<sup>498</sup> decided three years after *Edie v. East India Company*, Mansfield again undertook to clarify the law of Holt. The case involved an inland bill of exchange payable to the "Ship Fortune or Bearer." It had been lost by the defendant and passed by an unknown finder to a bona fide plaintiff for good consideration (five pounds worth of tea). The defendant had stopped payment. The issue was whether a bearer could possess by delivery without endorsement. The defendant argued that Holt's opinion in *Nicholson v. Sedgwick*<sup>499</sup> controlled, but Mansfield was not impressed, believing that case to be "upon general Principles . . . not agreeable to Law and Justice."<sup>500</sup> Mansfield had originally put to the jury the question whether

<sup>492</sup> 97 Eng. Rep. at 800. Later in *Ancher v. Bank of England*, 99 Eng. Rep. 404 (K.B. 1781), Mansfield would further refine the law of restrictive endorsements, and hold that an endorsement consisting of the words, "The within must be credited to D., value in account" constituted a restrictive endorsement. *Id.* at 404; see J. HOLDEN, *supra* note 450, at 118-21.

<sup>493</sup> *Vallego v. Wheeler*, 98 Eng. Rep. 1012, 1017 (K.B. 1774) ("[I]n all mercantile transactions the great object should be certainty."). See J. HOLDEN, *supra* note 450, at 119 n.4.

<sup>494</sup> 98 Eng. Rep. 1243 (K.B. 1777).

<sup>495</sup> *Id.* at 1244.

<sup>496</sup> 98 Eng. Rep. 1339 (K.B. 1778).

<sup>497</sup> *Id.* at 1342.

<sup>498</sup> 97 Eng. Rep. 957 (K.B. 1764).

<sup>499</sup> 91 Eng. Rep. 1016 (K.B. 1703).

<sup>500</sup> 97 Eng. Rep. at 960.

"such Draughts as this . . . were, in the course of Trade, Dealing and Business, *actually* Paid away and negotiated, or *In Fact* and *Practice* negotiable."<sup>501</sup> The jury, a "special jury of merchants,"<sup>502</sup> came in for the defendant. Mansfield put this verdict aside, explaining that "I *ought not* to have left the *latter* Point to them: For it is a Question of *Law*, 'whether a Bill of Note be *negotiable*, or not.'"<sup>503</sup> The bill, he observed, came "*bona fide* and in the *Course of Trade*, into the Hands of the present Plaintiff, who paid a *full and fair Consideration for it*."<sup>504</sup> Mansfield concluded that both parties were innocent and "by *Law*" the loss falls on the defendant, rather than on a bona fide purchaser for good consideration.<sup>505</sup>

The holding in *Grant v. Vaughan*, which remains good law in many jurisdictions, was later reinforced in *Peacock v. Rhodes*.<sup>506</sup> There, an inland bill with a blank endorsement had been stolen and later negotiated. The innocent endorsee recovered against the drawer. Striving to develop a uniform holding with respect to the negotiability of bearer bills, Mansfield permitted only the issue of the endorsee's innocence to go to the jury:

I see no difference between a note indorsed blank, and one payable to bearer. They both go by delivery, and possession proves property in both cases. The question of mala fides was for the consideration of the jury. The circumstances, that the buyer and also the drawers were strangers to the plaintiff, and that he took the bill for goods on which he had a profit, were grounds for suspicion, very fit for their consideration. But they have considered them, and have found it was received in the course of trade, and, therefore, the case is clear, and within the principle of all those Mr. Wood has cited, from that of *Miller v. Race*, downwards, to that determined by me at *Nisi Prius*.<sup>507</sup>

The decision in *Grant v. Vaughan* reveals that Mansfield was undeterred by either adverse prior judicial precedent or adverse factual determination by a special jury of merchants. His desire to achieve uniformity in like cases was equally obvious in *Peacock v. Rhodes*. Both cases reflect deliberate, conscious judicial lawmaking, as systematic and principled as the case law format permitted.

The stage was now set for Mansfield's ultimate mercantile case, *Pillans v. Van Mierop*.<sup>508</sup> The facts are familiar to generations of law students. Plaintiffs, Dutch merchants, sought a confirmed credit on a London banking

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<sup>501</sup> *Id.* at 961.

<sup>502</sup> *Id.* at 957. For a good discussion of Mansfield and "special juries," see Oldham, *supra* note 353, at 140 n.13.

<sup>503</sup> 97 Eng. Rep. at 961.

<sup>504</sup> *Id.* at 962.

<sup>505</sup> *Id.*

<sup>506</sup> 99 Eng. Rep. 402 (K.B. 1781).

<sup>507</sup> *Id.* at 403.

<sup>508</sup> 97 Eng. Rep. 1035 (K.B. 1765).

"house of rank" as a condition for accepting a bill of exchange drawn on them by one White. White named the defendants, London merchants, and the plaintiffs honored the bill. At this point there had been no contract between the plaintiffs and defendants, but later the defendants agreed in writing to accept a bill for the same amount to be drawn on them in "a month's time" by plaintiffs on White's credit. White failed, and the defendants gave notice to the plaintiffs not to draw upon them. The defendants obtained a verdict at the trial, and on a motion for new trial, defendant's counsel argued that his client's undertaking was either a "naked promise" unsupported by any consideration, or that all the consideration was past, and this would not support an assumpsit.

Here was the opportunity to sweep the involved and complex doctrine of consideration away from commercial transactions. Mansfield seized it:

This is a Matter of great Consequence to Trade and Commerce in every Light.

If there was any kind of Fraud in this Transaction, the Collusion and *mala Fides* would have *vacated* the Contract. But from these Letters, it seems to Me clear that there was *none*.

. . . .

If there be *no* Fraud, it is a mere Question of Law. The Law of *Merchants* and the Law of the *Land* is the *same*: A Witness cannot be admitted, to prove the Law of Merchants. We must consider it as a Point of Law. A *nudum Pactum* does not exist, in the Usage and Law of Merchants.

I take it that the ancient Notion about the Want of Consideration was for the Sake of *Evidence* only: For when it is reduced into *Writing*, as in Covenants, Specialties, Bonds, etc., there was no Objection to the Want of Consideration. And the Statute of Frauds proceeded upon the same Principle.

In *Commercial* Cases among Merchants, the Want of consideration is *not* an Objection.

. . . .

This is an Engagement 'to accept the Bill,[]' if there was a Necessity to 'accept it; and to pay it, when due:' And they [defendants] *could not afterwards retract*. It would be very destructive to Trade and to Trust in Commercial Dealing, if They could. There was Nothing of *nudum Pactum* mentioned to the Jury; nor was it, I dare say, at all in *their* Idea or Contemplation.<sup>509</sup>

Only after wading through hundreds of earlier mercantile cases can one really appreciate the boldness of this decision. The radical step was not the statement that "The law of Merchants and the law of the Land is the same." Holt had recognized that, as did many before him.<sup>510</sup> Nor was it the unqualified statement that "a witness cannot be admitted to prove the Law of

<sup>509</sup> *Id.* at 1038 (quote is in original form used by Lord Mansfield in 3 Burrow's Reports 1669-1670).

<sup>510</sup> See *supra* text accompanying notes 6-16, 369-408, 420-41.

Merchants." There were roots of that as well in the earlier notion of general mercantile usage.<sup>511</sup> The truly courageous step was Mansfield's flat abolition of the doctrine of consideration in mercantile dealings, in the face of an adverse jury verdict and much precedent to the contrary, all in the name of "trade and . . . trust in commercial dealing." It was a bold, utilitarian principle.

Experts have argued endlessly about the *ratio decidendi* of *Pillans v. Van Mierop*. There were four judges. While all four unanimously set aside the verdict and ordered a new trial, the reasons given by the other three were far less clear. It has been said that the holding establishes the principle that the bill of exchange was a "specialty." As Judge Yates explained in his opinion, "bills of exchange are considered, and are declared upon as special contracts; though legally, they are only simple contracts: the declaration sets forth the bill and acceptance specifically: and that thereby the defendants, by the custom of merchants, become liable to pay it."<sup>512</sup>

But there was no such accepted bill, drawn without consideration, in the case, but just "a gratuitous promise to accept" a future bill.<sup>513</sup> In any event, *Rann v. Hughes* and the House of Lords would put an end to such a heresy in thirteen years.<sup>514</sup> Mansfield's opinion contained the seeds of another proposition, simpler and equally heretical. Unless the practicalities of evidence required otherwise, moral obligation should be equated with consideration. As Mansfield stated approximately fifteen years later in *Hawkes v. Saunders*:<sup>515</sup>

Where a man is under a legal or equitable obligation to pay, the law implies a promise, though none was ever actually made. *A Fortiori*, a legal or equitable duty is a sufficient consideration for an actual promise. Where a man is under a moral obligation, which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration."<sup>516</sup>

This thesis would be continued in the context of bankruptcy.<sup>517</sup>

Mansfield's determination to establish a certain and principled law of negotiable instruments eventually brought him into a series of conflicts with Guildhall juries. For example, in *Medcalf v. Hall*,<sup>518</sup> the issue was whether the plaintiff had presented a bill for payment within a "reasonable time" when, having received a draft at one o'clock in the afternoon, he had failed to get it accepted at the appropriate address one-half mile distant by five

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<sup>511</sup> See Coquillette, *supra* note 30, at 346-63.

<sup>512</sup> 97 Eng. Rep. at 1040.

<sup>513</sup> J. HOLDEN, *supra* note 21, at 136 n.1.

<sup>514</sup> *Id.*

<sup>515</sup> 98 Eng. Rep. 1091 (K.B. 1782).

<sup>516</sup> *Id.* at 1091.

<sup>517</sup> See *Trueman v. Fenton*, 98 Eng. Rep. 1232 (K.B. 1777).

<sup>518</sup> 99 Eng. Rep. 566 (K.B. 1782).

o'clock that evening.<sup>519</sup> The jury held that the plaintiff had acted reasonably, but Mansfield ordered a new trial.<sup>520</sup> A second and third jury held for the plaintiff, and each time Mansfield brushed the verdict aside, recoiling at "the great inconvenience which it would occasion in the circulation of paper."<sup>521</sup> Finally, the plaintiff gave up.

In *Appleton v. Sweetapple*,<sup>522</sup> which involved the similar question of what constituted reasonable notice of dishonor before suing an endorser, Mansfield again ordered a new trial, prompting Justice Buller to observe:

In a question of law, however unpleasant it may be to us, we must not yield to the decision of a jury. I do not doubt if a special jury in London will, if desired, find a special verdict. The usage is to be considered, but such usage must be reasonable, and it is for the Court to say whether it is good or bad.<sup>523</sup>

Later, in *Tindal v. Brown*,<sup>524</sup> Mansfield came just short of holding that "reasonable notice" was a question of law; although he ultimately retreated to the safer yet equally bold proposition that it was "partly a question of fact and partly a question of law."<sup>525</sup> Was this Mansfield's last effort at establishing commercial certainty while retaining some input for usage as a matter of fact? If so, he was clearly attempting to keep the question of usage within the control of the court. Eventually, frustrated with the commercial jury and wanting "bright line" uniformity in commercial dealings, Mansfield moved closer in his last years on the bench to the ultimate modern solution: a codified commercial law containing carefully restricted "elastic" clauses for the trier of fact.<sup>526</sup>

It would be too much to say that Mansfield "invented" English commercial law, but Joseph Story was correct in saying that Mansfield "was one of those great men raised up by Providence, at a fortunate moment he became what he intended, the jurist of the Commercial World."<sup>527</sup> As Shientag observed, Mansfield "created a body of systematic legal principles, in conformity with the realities of business needs . . . . His decisions in this field amounted to judicial legislation of the first order."<sup>528</sup>

<sup>519</sup> *Id.* at 566.

<sup>520</sup> *Id.*

<sup>521</sup> *Id.* at 567; see C. FIFOOT, *supra* note 442, at 112.

<sup>522</sup> 99 Eng. Rep. 579 (K.B. 1782).

<sup>523</sup> *Id.* at 580; see C. FIFOOT, *supra* note 442, at 113.

<sup>524</sup> 99 Eng. Rep. 1033 (K.B. 1786).

<sup>525</sup> *Id.* at 1034; see C. FIFOOT, *supra* note 442, at 113.

<sup>526</sup> See C. FIFOOT, *supra* note 442, at 110-15; Oldham, *supra* note 353, at 210. But the form of modern commercial statutes has delegated much back to the courts. See Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 626-35 (1975); Schlesinger, *The Uniform Commercial Code in Light of Comparative Law*, 1 INTER-AM. L. J. 11, 36-58 (1959).

<sup>527</sup> J. STORY, MISCELLANEOUS WRITINGS 262 (Boston 1835).

<sup>528</sup> Shientag, *supra* note 442, at 351.

Mansfield was a jurist in the finest sense. While he may not have invented the law of negotiable instruments or other commercial doctrines, his decisions gave English commercial law a far more systematic and rational structure. Mansfield also sought to make these principles persuasive and self-evident by demonstrating their utility, and he strove for consistency, certainty, and universality. Here Mansfield drew deeply on the comparativist and rationalist tradition of the English and continental civilian jurists. His decisions contain hundreds of citations to their treatises and sources.<sup>529</sup> Like Bacon, Selden, and Hale, the character of Mansfield's juristic thought testified to this influence.<sup>530</sup> Yet, unlike Bacon, Selden, and Hale, Mansfield's sole juristic vehicle was the reported decision—the case law tool of today's judiciary.

As young men, both Edmund Burke and Jeremy Bentham sat at the back of Mansfield's courtroom. It was, in Bentham's words, like visiting "the chief seat of the living idol."<sup>531</sup> Both the inventor of conservative modern constitutional theory and the pioneer of the modern codification movement learned from Mansfield what modern adjudication could mean.<sup>532</sup> Those that influenced Mansfield, influenced the entire future of the Anglo-American law.

#### IV. CONCLUSION: "RECEPTION" AND "INCORPORATION"

The English civilian jurists were at a nexus between two systems of ideas about law. Their legal ideology, which "found expression in the rediscovery, in a spiritual more than a literal sense, of the great heritage of the Roman classical jurists,"<sup>533</sup> was also the product of the scientific and humanistic studies of the great continental jurists of the sixteenth and seventeenth centuries, to which the English civilians looked for leadership.<sup>534</sup> Despite

<sup>529</sup> See Rodgers, *supra* note 465, at 728; see also 12 W. HOLDSWORTH, *supra* note 21, at 549-60 (observing that Mansfield incorporated the customs and principles of the times into the common law, thus demonstrating to future jurists how common law could adapt to the problems of a new age).

<sup>530</sup> See C. FIFoot, *supra* note 442, at 230-53; Shientag, *supra* note 442, at 382-88. Fifoot spoke of Mansfield's juristic thought as having a "scientific spirit." C. FIFoot, *supra* note 442, at 233. This would have struck a chord in Bacon's soul!

<sup>531</sup> Bentham stated: "From the first morning on which I took my seat on one of the hired boards, that slid from under the officers' seat in the area of the King's Bench . . . at the head of the gods of my idolatry, had sitten the Lord Chief Justice . . . Days and weeks together have I made my morning pilgrimage to the chief seat of the living idol." 12 W. HOLDSWORTH, *supra* note 21, at 554-55 (citing 1 J. BENTHAM, *THE WORKS OF JEREMY BENTHAM* 247 (J. Browning ed. London 1843)). As to the influence on Burke, see *id.* at 554; E. HEWARD, *supra* note 353, at 165, 178.

<sup>532</sup> See *supra* note 526 and accompanying text.

<sup>533</sup> Wieacker, *supra* note 253, at 275-76.

<sup>534</sup> See Coquillette, *supra* note 68, at 22-35.

their common law surroundings, the English civilians maintained and defended their own institutional forums: the university curriculum, the Doctors' Commons, and their specialist court jurisdictions. They also tenaciously asserted their own ideas about the proper sources of law and the proper methods of resolving legal disputes.

It was these collective legal ideas, this legal ideology, which was the most important historical fact about the English civilians. We are all familiar with the controversies over the jury trial, which the English civilians resisted. They preferred conceptualized authority, as manifested in treatises, maxims, and codes. They had a reciprocal aversion to incremental lawmaking by ad hoc judicial decisions, despite the importance of case law to the *consilia* and *responsa* of the classical jurists.<sup>535</sup>

Their most important ideas, however, related to their method of legal problem solving. As Wieacker has observed, it was "decision-making not on the basis of precedents, but by the way of subsuming a case under the terms of an abstractly formulated authoritative text or statute."<sup>536</sup> The civilian search for abstractly formulated authority, to achieve "control of legal decision-making by means of a consistent system of cognitive principles,"<sup>537</sup> was at the heart of the humanist civilian renaissance of the sixteenth century and had a profound impact on the early English civilian jurists. It made them rationalists and legal scientists, committed to an objective study of the utility of legal rules in history and practice. This, in turn, made them the pioneers of comparative law and modern legal history.<sup>538</sup> Some, even more daring, sought to discover "a universal concept of law," one universal legal order of principles common to the canon and civil law, the *ius utrumque*.<sup>539</sup>

Coke and other great common law jurists were quick to attack the presumptions of the "Roman Idea." They argued that its emphasis on rationality and on a jurist elite that was "neither legislators nor judges; neither advocates nor prosecutors,"<sup>540</sup> invited absolutist monopolies on truth and justice. Further, the search for the "universal law" seemed to Coke dangerously linked to the universal legal claims of the Catholic Church, and it was inconsistent with his strong sense of nationalism and his belief, limited but sincerely held, in English populism and localism.<sup>541</sup> Coke also feared any encroachments on what he saw as the ultimate guardian of private English rights, the Inns of Court.

The explosive growth of international commerce during this period

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<sup>535</sup> See J. DAWSON, *THE ORACLES OF THE LAW* 100-47 (1968); Wieacker, *supra* note 253, at 267-68.

<sup>536</sup> Wieacker, *supra* note 253, at 258.

<sup>537</sup> *Id.* at 262.

<sup>538</sup> See Coquillette, *supra* note 68, at 87-89.

<sup>539</sup> See Wieacker, *supra* note 253, at 275, 278, 280.

<sup>540</sup> *Id.* at 283.

<sup>541</sup> For more detail on Coke, see Coquillette, *supra* note 68, at 76-87.



brought into sharper focus this ideological schism. Of course, international trade was not new to England, but its coexistence with legal nationalism was at best uneasy. The growing scope and importance of this new commercial wealth, beginning in the late sixteenth century, threatened to displace land as the focus of English law.<sup>542</sup>

One would have thought that this provided the English civilians with an unmatched opportunity. Their Doctors' Commons was firmly established by this key period. It was a vital professional center backed by formidable intellectual resources in the universities. In addition, they held the crucial Admiralty jurisdiction as a professional monopoly. Further, the very nature of international commerce would seem to favor cosmopolitanism and a belief in universality—a belief symbolized by the Latin language itself. These were cornerstones of the civilian juristic faith. The universal needs and problems of an international commerce seemed to demand self-justifying cosmopolitan principles, firmly erected upon the "universal language" of the civilian legal heritage.<sup>543</sup>

But, as this paper and its predecessors have demonstrated, this promise was never realized. We have described the final stages of this struggle: the ideological battles of Duck, Wiseman, and Zouche during the Interregnum, and the gallant political attempts following the Restoration by Exton, Godolphin, and Sir Leoline Jenkins to save the all important commercial jurisdiction for the Admiralty. The civilians failed, and retreated to the professional specialties and the university scholasticism whence they first emerged in the days of Henry VIII.<sup>544</sup>

Why did they fail? My thesis, set out extensively above, does not rely on the slings and arrows of outrageous political fortune, nor does it hypothesize a professional conspiracy of common lawyers. Levack's empirical studies of the period from 1603 to 1641 demonstrated that the English civilians were not the legal arm of Stuart absolutism, nor of any religious party.<sup>545</sup> Later events confirmed this conclusion. Some of the greatest civilian jurisdictional assertions were actually made during the Commonwealth, and their greatest political reversal was at the hands of a Restoration House of Lords.<sup>546</sup>

Rather, the civilians' failures were, in the last analysis, largely due to the limitations of what they had to offer the new commercial classes in competition with the common law. The common lawyers, reinforced by the prohibition, had demonstrated their ability to meet the practical needs of English commerce well before the Restoration, and the civilians simply failed to offer any convincing rival advantages. An examination of the development

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<sup>542</sup> See 1 E. LIPSON, *supra* note 174, at 511-94.

<sup>543</sup> Wieacker, *supra* note 253, at 280.

<sup>544</sup> See Coquillette, *supra* note 68, at 11-22.

<sup>545</sup> See W. LEVACK, *THE CIVIL LAWYERS IN ENGLAND 1603-1641*, at 50-157 (1973).

<sup>546</sup> See Coquillette, *supra* note 1, at 300-42.

of one crucial legal instrument of the new commerce, the bill of exchange, confirms this thesis.<sup>547</sup>

But this should not be the end of the story. Before the English civilians lost their final professional challenges to the common lawyers, they made a fundamental contribution to the development of English jurisprudence. This was not due to specific, incorporated civil law doctrines, although there were a few examples of these.<sup>548</sup> Nor was this limited to the Anglo-American codification movements that came a century later, although I will have more to say about this in another article.<sup>549</sup> Rather, their most important contribution was, ironically, to the methodology of English common law judicial decisionmaking.

This occurred in two stages. The first consisted of the strong influence of the new civilian legal humanism on early modern common lawyers and on intellectual leaders such as Bacon, Selden, Hobbes, and Hale.<sup>550</sup> While common law jurists certainly learned directly from continental sources, they also learned from their English civilian contemporaries. Although Hobbes was always somewhat suspect to common lawyers, Bacon's legal work was extremely popular during the Restoration, and Selden and Hale were virtual saints to a new professional generation.<sup>551</sup> The professional loyalties of such

<sup>547</sup> See *supra* text accompanying notes 210-51.

<sup>548</sup> See R. HELMHOLZ, *supra* note 254, at 8-15, 18. An extensive review of canon law doctrine from this perspective is badly needed.

<sup>549</sup> I intend to focus on the juristic thought of John Adams, Joseph Story, and Jeremy Bentham. See Coquillette, *Justinian in Braintree: John Adams, Civilian Learning, and Legal Elitism, 1758-1775*, in *LAW IN COLONIAL MASSACHUSETTS 1630-1800*, at 359-418 (D. Coquillette, R. Brink & C. Menand eds. 1984).

<sup>550</sup> See *supra* text accompanying notes 259-352. As Wilfred Prest observed:

Both those who unashamedly borrowed from the methodolizing jurisprudence of the civil law and those who sought to devise a more rational order for the common law without explicit reference to the *Corpus Juris* had necessarily acquired more than a passing acquaintance with Roman law. Indeed, there is much evidence to suggest that early modern common lawyers were far less hostile towards, or ignorant about, the civil law than has hitherto been generally supposed.

W. PREST, *THE RISE OF THE BARRISTERS: A SOCIAL HISTORY OF THE ENGLISH BAR 1590-1640*, at 191 (1986).

<sup>551</sup> For a good discussion of Bacon's contributions, see generally Wheeler, *supra* note 261. Bacon's writings were very much in print following the Restoration. See, e.g., *RESUSCITATIO OR, BRINGING INTO PUBLICK LIGHT SEVERAL PIECES OF THE WORKS . . . HITHERTO SLEEPING OF THE RIGHT HONOURABLE FRANCIS BACON* (W. Rawley ed. London 1671). See generally R. GIBSON, *FRANCIS BACON: A BIBLIOGRAPHY OF HIS WORKS AND OF BACONIANA TO THE YEAR 1750* (1950) (providing a complete list of Bacon's Restoration printings). As to Selden, see E. FLETCHER, *JOHN SELDEN 1584-1654* (1969); Ziskind, *supra* note 286, at 22-29. As to Hale, see Gray, *Introduction to M. HALE*, *supra* note 320, at xi-xxxviii (C. Gray ed. 1971); E. HEWARD, *supra* note 317, at 168-78.

jurists were beyond doubt, and their popular treatises were widely circulated.

These jurists had a fundamental message for their successors, and it was explicitly indebted to civilian humanism. To them, the law was a rational science, fully knowable only by an empirical appreciation of its historical context. Distinguishing good from bad law involved testing the utility of the rule or doctrine in practice, as well as its clarity and certainty as a matter of theory. The comparative and historical studies of both the English and continental civilians had convinced them of the "essentially progressive," as well as universal, nature of legal science.<sup>552</sup> Bacon's *Maxims of the Law* and his *The Eighth Book of De Augmentis Scientiarum*<sup>553</sup> were vivid demonstrations of this faith. Selden's *Ad Fletam Dissertatio* and Hale's *Preface to Rolle's Abridgment and History of the Common Law of England* powerfully communicated this spirit to a new generation of common lawyers and judges, just at the time that improved law reporting gave common law judges a better vehicle for a progressive case law jurisprudence.<sup>554</sup>

The second stage of this juristic indebtedness came with Holt and Mansfield. They were the ones who actually incorporated the new methodology into the judicial process. Some scholars have characterized Holt as the last disciple of Coke, and described Mansfield as the first flower of some commercial enlightenment. It is true that, compared to Holt, Mansfield's civilian debt was explicit and was reflected in hundreds of citations to civilian sources of all kinds. But a close examination of any commercial doctrine, including those relating to bills of exchange, demonstrates that most of the doctrinal content of the new commercial law was already in place well before Mansfield's time.<sup>555</sup> Holt's dour style and his terrible reporters require that, with a few exceptions such as *Coggs v. Bernard*, we must look to what he did, rather than what he said, if we are to appreciate the scope of his learning and his judicial philosophy. And, of course, as a pioneer of legal instrumen-

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<sup>552</sup> Wieacker, *supra* note 253, at 261, 266; see Coquillette, *supra* note 68, at 27-29; see also R. WISEMAN, *supra* note 571, at *Epistle to the Reader* (unpaginated) (stating that his intention in writing his treatise was "to make known to the people of this Nation . . . how excellent it [civil legal science] is in itself, how rational; what a general approbation it has had with other Nations, and how very usefull it may be to the publick welfare of this Nation divers ways, it is a work so seasonable and necessary . . . and it is no more than the present state of things calls for").

<sup>553</sup> For Bacon's *Maxims of the Law*, see 7 WORKS, *supra* note 261, at 307-87. The most relevant section of *De Augmentis* is F. BACON, *Example of A Treatise of Universal Justice or the Fountains of Equity, by Aphorisms*, in 5 WORKS, *supra* note 261, at 88-109; see *supra* text accompanying notes 261-76.

<sup>554</sup> See I. SELDENI, *AD FLETAM DISSERTATIO* (D. Ogg trans. 1925); M. HALE, *THE HISTORY OF THE COMMON LAW OF ENGLAND* (C. Gray ed. 1971); *supra* text accompanying notes 285-310, 317-45.

<sup>555</sup> See *supra* notes 369-439 and accompanying text; Baker, *supra* note 6, at 320-22.

talism, Holt was working one half century before Mansfield's earliest cases.<sup>556</sup> Making due allowance for these facts, Holt's progressive contribution, as well as his debt to the spirit of Selden and Hale, cannot be overlooked.

Still, it seems natural to conclude this survey with Lord Mansfield. More than any other single individual, Mansfield established the prominence of the judge in Anglo-American jurisprudence. He was also a pioneer of scientific methodology in judicial decisionmaking. This article has discussed his civilian debts, but it is Wieacker who provides the best description of what would have interested Mansfield most. Wieacker noticed that his most "practical-minded students" were the ones who ultimately became enthralled with the classical civilian texts:<sup>557</sup>

[The "practical student"] can learn the Roman jurist's method of clearly distinguishing legal issues and making those issues precise—an exercise which is essential for the objectification of social and political conflicts. Similarly, he can try to develop their sure instinct for the reality and practicability of legal solutions. He can, moreover, observe how they arrived at new and elegant solutions through the disciplined use of legal imagination. Even today, nothing develops the ability to discover the underlying legal issue in statutes or precedents more than the study of the casuistry of the classical jurists.<sup>558</sup>

Mansfield was just such a "practical student." His interest in civilian comparativist studies, in civilian juristic methodology, and even in the civilian appeal to the universality of legal reasoning, was inherently practical and utilitarian. It helped him to establish the authority of the common law and the common law bench by judicial decisions that were self-justifying, useful, and principled. The civilian methods offered him a progressive model of legal reasoning and decisionmaking, and a vehicle for logical realism. These, in turn, were the tools which enabled Mansfield to attempt to escape from the worst strictures of precedent justice, jury trial, and formulaic pleading, while retaining their benefits.<sup>559</sup> Mansfield, of course, was not entirely successful. Nevertheless it is fair to say that his judicial style and method was the first substantial anticipation of the American utilitarian and instrumentalist approach to the judiciary. It was no accident that Bentham faithfully attended Mansfield's courtroom, or that Mansfield was one of the first to praise the *Fragment on Government*.<sup>560</sup>

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<sup>556</sup> See *supra* text accompanying notes 420-40. For an excellent work on "legal instrumentalism," see R. SUMMERS, *INSTRUMENTALISM AND AMERICAN LEGAL THEORY* (1982); Hurst, *supra* note 270, at 852-55 (1984).

<sup>557</sup> Wieacker, *supra* note 253, at 280.

<sup>558</sup> *Id.*

<sup>559</sup> See *supra* text accompanying notes 474-532.

<sup>560</sup> See *supra* note 531; C. FIFOOT, *supra* note 442, at 47, 49.

Mansfield hardly concludes the story of civilian influence on Anglo-American jurisprudence, and I remain at work on some specific problems relating to the last generation of civilian specialists, including William Scott, Lord Stowell (1745-1836), and Stephen Lushington (1782-1873).<sup>561</sup> I am also concerned about some peculiarly modern aspects of civilian jurisprudence, particularly as manifested by the works of Jeremy Bentham (1748-1832), Arthur Browne (1756?-1805), and Joseph Story (1779-1845).<sup>562</sup> But Mans-

<sup>561</sup> See Coquillette, *supra* note 1, at 354 n.262 and sources cited. For a standard account of this civilian "generation," see 13 W. HOLDSWORTH, *supra* note 21, at 668-99 (1st ed. 1952).

<sup>562</sup> See Coquillette, *supra* note 68, at 1-10; Coquillette, *supra* note 30, at 319 nn.12-15; Coquillette, *supra* note 549, at 359 n.3, 416-48.

Bentham's debt to continental sources and his dedication to systematic analysis and rationalism is well known. See, e.g., Alfange, *Jeremy Bentham and the Codification of Law*, 55 CORNELL L. REV. 58, 65-67 (1969); Hart, *Introduction to J. BENTHAM, OF LAWS IN GENERAL xxxi-xxxv* (H.L.A. Hart ed. 1970); Harrison, *Introduction to J. BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION vii-lxiv* (W. Harrison ed. 1967); D. LYONS, *IN THE INTEREST OF THE GOVERNED: A STUDY IN BENTHAM'S PHILOSOPHY OF UTILITY AND LAW* 107-37 (1973); Book Note, 97 HARV. L. REV. 1029, 1030-32 (1984).

Joseph Story (1779-1845) was certainly the greatest American legal educator before 1870. Appointed as Associate Justice of the United States Supreme Court in 1811 at the age of thirty-two, Story also served as a professor at Harvard Law School from 1829 until his death. He published a score of major treatises, including J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS* (Boston 1834); J. STORY, *COMMENTARIES ON THE LAW OF BILLS OF EXCHANGE* (Boston 1843); and J. STORY, *COMMENTARIES ON THE LAW OF PROMISSORY NOTES* (Boston 1845). He made major contributions to maritime and private international law. See Dunne, *Joseph Story: 1812 Overture*, 77 HARV. L. REV. 240, 255-56 (1963); 9 *DICTIONARY OF AMERICAN BIOGRAPHY* 102-08 (1935); A. SUTHERLAND, *THE LAW AT HARVARD* 92-139 (1967); G. CHESHIRE, *PRIVATE INTERNATIONAL LAW* 33 (77th ed. 1965). "[T]he extent of the influence which Story has exercised over the modern system of private international law can scarcely be overestimated." *Id.* at 33.

Story's attention to civilian sources was so extensive that he has been criticized in more recent times for paying "excessive respect to the Continental writers." *Id.* He probably was the one who persuaded Samuel Livermore of cosmopolitan New Orleans to bequeath, in 1833, an extraordinary collection of books to a young Harvard Law School. This was a "whole library of foreign law, consisting of the works of the leading civilians and jurists of continental Europe, and amounting in number to upwards of three hundred costly volumes. . . [and] is probably not exceeded, and perhaps not equalled by any other collection of the same size in America, if it be in Europe." 2 J. QUINCY, *THE HISTORY OF HARVARD UNIVERSITY* 424-25 (1st ed. Cambridge 1840). This collection, in fact, was barely equalled by the Library of Doctors' Commons in London, soon to be tragically dispersed, or by any other collection in the Anglo-American world. See Coquillette, *supra* note 68, at 7, 11 n.22. See generally *CATALOGUE OF THE BOOKS IN THE LIBRARY OF THE COLLEGE OF ADVOCATES IN DOCTORS' COMMONS* (London 1818).

field, as a case law jurist, is a superb example of my fundamental conclusion—that the English civilian heritage made a special methodological contribution to English law, quite apart from incorporating specific doctrines and quite apart from the later codification movements.

In his brilliant inaugural lecture as Regius Professor of Civil Law in Cambridge University, Peter Stein stated:

If we search the Roman legal texts for an express theory of law and its growth, we will be disappointed. *But if we look at the way the Roman jurists reached their decisions, the way they gathered those decisions into rules, the way they related one rule to another and extended some rules and restricted others, we can find much that is relevant for our problems today.* For in these respects Roman law itself is closer to the common law than is any modern codified system based on Roman law. It is capable of offering yet again a basis of comparison for English lawyers and of thus fulfilling its traditional role of providing a stimulus for English jurisprudence.<sup>563</sup>

This was the most important aspect of the “incorporation” of civilian legal ideas into modern English common law. If we look for express, specific doctrinal examples, we shall be disappointed. We will come away impressed, instead, with the actual flexibility and innovativeness of the common lawyers, in spite of the facade of conservatism they so frequently adopted for political reasons. On the other hand, if we look to legal methodology and legal process, “the way the . . . jurists reached their decisions, the way they gathered these decisions into rules, the way they related one rule to another and extended some rules and restricted others,”<sup>564</sup> the story is

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Arthur Browne (1756?-1805) was an Irish jurist and Regius Professor of Civil and Canon Law at Trinity College, Dublin, from 1785-1805. In 1798, he wrote the extremely influential *A COMPENDIOUS VIEW OF THE CIVIL LAW*. See 1 DNB, *supra* note 277, at 234. The similarities between Browne and Story are extensive: both were born in New England (Browne nearly went to Harvard instead of Trinity College); both held judgeships and endowed professorships—combining scholarship and practical experience; both were deeply concerned with legal education; and both wrote bad poetry. Bentham, Browne, and Story were all dedicated to the rationalization of commercial law, to legitimation by utility of legal doctrine, and to the expression of legal principles in a comprehensive and clear manner, whether by statute or treatise.

My future intention is to examine the letters and writings of Bentham, Browne, and Story in detail, and to carry my analysis of the study and application of civilian sources forward into the “life of the mind” of nineteenth century, with a particular emphasis on Benthamite and American jurisprudence. Cf. P. MILLER, *THE LEGAL MIND IN AMERICA* 285-95 (1962); P. MILLER, *THE LIFE OF THE MIND IN AMERICA* 239-65 (1965).

<sup>563</sup> P. STEIN, *ROMAN LAW AND ENGLISH JURISPRUDENCE YESTERDAY AND TODAY* 27 (1969).

<sup>564</sup> *Id.* As J.A.C. Thomas put it:

Roman law was, in its prime, characterised by a conservatism that resulted in the

very different. It was here that the English civilian jurists excelled in juristic writing, and where their contribution to English law was genuinely important. In Wieacker's words, "They made the timeless problems the texts posed their own concern."<sup>565</sup>

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retention of old forms long after their intrinsic usefulness had disappeared and astute reinterpretation was necessary to make them work in changed social circumstances. Yet, indeed, it is in this that there lies the greatness of the achievement of the Roman jurists and this which makes them a model for every student of jurisprudence: the ability to retain the form while modifying the substance, the mastery of the art of interpretation which effected a harmonising of the opposing claims of justice in the individual case with the certainty that is an essential ingredient of any legal system worthy of the name and the ability to put existing institutions to wholly new uses as new situations developed.

J. THOMAS, TEXTBOOK OF ROMAN LAW 55 (1976); see A. WATSON, THE MAKING OF THE CIVIL LAW 190-91 (1981).

<sup>565</sup> Wieacker, *supra* note 253, at 276.